Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

JUDDS BROTHERS CONSTRUCTION COMPANY,

Petitioner,

v.

BURLINGTON NORTHERN RAILROAD COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a party's rights to due process and a jury trial under the Fifth and Seventh Amendments to the United States Constitution and F.R.Civ.P. 16(e) and 8(c) are fundamentally violated when a trial court departs from F.R.Civ.P. 8(c) and 16(e) and vacates a jury's findings on the basis of an affirmative defense not asserted in the pre-trial order. More specifically, whether a plaintiff's rights to due process and a jury trial are violated by a post trial ruling that the statute of frauds required vacation of a jury verdict, given that this affirmative defense was first pled but then waived when not set forth in the pre-trial order, was not argued during the trial, but without notice was then resurrected sua sponte in the court's post trial order.

2. Whether a party's rights to due process and a jury trial under the Fifth and Seventh Amendments to the United States Constitution and F.R.Civ.P. 8(c) and 16(e) are fundamentally violated when the appellate court effectively refuses to address whether the trial court committed constitutional and prejudicial procedural error in vacating a jury's finding on the basis of an unasserted trial issue regarding the statute of frauds.

3. Whether a party's rights to due process and a jury trial under the Fifth and Seventh Amendments to the United States Constitution and F.R.Civ.P. 16(e) and 8(c) are fundamentally violated when a trial court totally departs from F.R.Civ.P. 8(c) and 16(e) and vacates a jury's findings on the basis of the parol evidence rule and denies a plaintiff the opportunity to adduce evidence

QUESTIONS PRESENTED – Continued

related to the various exceptions to the parol evidence rule:

(a) where neither the pleadings nor pre-trial order raised the parol evidence rule as an affirmative defense or issue for trial; and

(b) where the trial court overruled all "In Limine" motions and trial objections based on the parol evidence rule;

4. Whether an appellate court departs from and totally disregards F.R.Civ.P. 8(c) and 16(e) and denies a party's Fifth and Seventh Amendments rights to fundamental due process by summarily disposing of the claim of constitutional error in a trial court's vacation of a jury's verdict on the basis of an unpled parol evidence and statute of fraud rules, by stating only that they thoroughly examined the "appellant's constitutional challenge and any other arguments not addressed by the District Court's opinion and find these issues to be without merit," given that the applicable standard of review requires that a jury verdict be affirmed unless the record is devoid of any evidence whatsoever to support it.

LIST OF PARTIES

There are no additional parties to those named in the caption of this matter. Atlas Company of Lincoln, Co-Defendant below, is not a party to this Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit. There is no parent or subsidiary company of Judds Brothers Construction Company to be listed pursuant to Rule 29.6.

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PETITION FOR A WRIT OF CERTIORARI

Because there occurred such a radical departure from the accepted and usual course of judicial proceedings, the Petitioner, Judds Brothers Construction Company, respectfully requests that a writ of certiorari issue to review the order of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on July 9, 1999, affirming the judgment of the United States District Court for the District of Nebraska.

OPINIONS BELOW

The Eighth Circuit's order denying Petitioner's Petition for Rehearing and Rehearing En Banc, entered August 26, 1999, is unreported, but appended to this Petition. (App., *infra*, 127). The Eighth Circuit's panel opinion on the merits of the appeal is unreported, but appended to this Petition. (App., *infra*, 1). The Order of the United States District Court for the District of Nebraska granting Respondent's Motion for Judgment as a Matter of Law is unreported, but appended to this Petition. (App., *infra*, 4). The Memorandum Opinion of the United States District Court for the District of Nebraska granting Respondent's Motion for Judgment as a Matter of Law is unreported, but appended to this Petition. (App., *infra*, 5).

JURISDICTION

The order sought to be reviewed in this Petition was filed on July 9, 1999. (App., *infra*, 1). Petitioner filed a Petition for Rehearing and Rehearing en banc in the Eighth Circuit on July 22, 1999. The Eighth Circuit entered an order denying the Petition for Rehearing and for Rehearing en banc on August 26, 1999. (App., *infra*, 127). This Petition is filed within 90 days of the order of August 26, 1999.

The jurisdiction of this Court to review the order of the Eighth Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Amendment V of the United States Constitution provides in relevant part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law . . .

2. Amendment VII of the United States Constitution provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, *and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law*" (emphasis added)

3. F.R.Civ.P. 8(c) provides:

> *Affirmative Defenses.* In pleading to a preceding pleading, a party shall set forth affirmatively,

accord and satisfaction, . . . failure of consideration, fraud, illegality . . . *statute of frauds . . . and any other matter constituting an avoidance* or affirmative defense. (emphasis added)

4. F.R.Civ.P. 16(e) provides:

Pretrial Orders. After any conference held pursuant to this rule, an order shall be entered reciting the action taken. *This order shall control the subsequent course of the action* . . . The order following a final pretrial conference shall be modified only to prevent manifest injustice. (emphasis added)

STATEMENT OF THE CASE

On June 3, 1998, the United States District Court for the District of Nebraska[1] vacated an April 7, 1998, jury verdict in the amount of $791,232 entered in favor of Judds Brothers Construction Co. ("Judds") and against the Burlington Northern and Santa Fe Railroad ("Burlington"). (App., *infra*, 4-14). The jury found that the Burlington had breached an agreement with Judds in settlement of prior litigation between the parties. (App., *infra*, 115-116). Trial exhibits 81 & 85 were offered as evidence of an agreement (App., *infra*, 134-135, 138), and the court instructed the jury that they could consider such exhibits in determining whether an agreement existed. (App., *infra*, 111). Over Burlington's parol evidence objections, the trial court received testimony of the oral

[1] Jurisdiction in the District Court was based on 28 U.S.C. § 1332, pertaining to diversity of citizenship.

negotiations and agreements between the principal parties involved in the discussions. While Judds could have laid additional foundation under the fraud and other exceptions to both the parol evidence and statute of frauds rules, it did not do so because (1) the statute of frauds was not even an issue at the actual trial, (2) the parol evidence rule was not listed as an issue in the pretrial order and (3) the trial court, in overruling the objections, rendered additional evidence irrelevant and violative of F.R.Evid. 403.

The jury found: (a) that Judds and the Burlington had in fact entered into an agreement whereby Judds was to be permitted to bid on future projects and was to be awarded contracts if it were the low bidder; (b) that the Burlington breached such agreement; and (c) that Judds had been damaged in the amount of $791,232. (App., *infra*, 115-116).

However, after the close of evidence, on Burlington's motion for judgment as a matter of law ("JMAL"), the trial court ruled (1) that the evidence of the oral agreement was inadmissible because of a statute of frauds issue not raised in the pre-trial order, and (2) that any issue of a binding contract evidenced by written documents (Exhibits 81 & 85) was precluded by the unpled parol evidence rule. (App., *infra*, 5-14). Having made those post-trial determinations the trial court, instead of conducting further proceedings to allow Judds to fully develop the record and enter additional evidence of fraud and other relevant exceptions to the statute of frauds and parol evidence rule, simply entered judgment in favor of the Burlington.

On review, the Eighth Circuit Court of Appeals[2], affirmed the trial court's order stating only that it saw "no reason to undertake a protracted discussion on the subject" and that "for [Judds'] constitutional challenge and any other argument not addressed by the District Court's Opinion, we have thoroughly examined the record and transcripts and find these issues to be without merit". (App., *infra*, 3). Thus, Judds' arguments regarding both the fundamental denial of its right to due process, as guaranteed by the Fifth Amendment and the unexplained departure from F.R.Civ.P. 8(c) and 16(e) have never been considered by any court.

Judds believes that the incredible departure from both these sacred rules of procedure, notice, and process, and the JMAL standard of review recognized by every appellate court in the land – i.e. that no jury verdict will be vacated if there is any evidence which will support such verdict – constitute such a departure from the accepted and usual course of judicial proceedings that the supervision and intervention from this Supreme Court is justified. Since Judds has never been at least given the chance, after the trial court changed its evidentiary rulings, to lay additional foundation to further establish that the testimony at issue fell within one of the many exceptions to the parol evidence and statute of frauds rules, its basic and constitutional right to a trial by jury has been totally ignored.

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[2] Jurisdiction of the United States Court of Appeals for the Eighth Circuit was based on 28 U.S.C. §§ 1291, 1294(1) and Fed.R.App.P. 4(a).

To assure Judds its fundamental rights of due process at trial and on appeal, to have its constitutional issues considered on appeal, to preserve the integrity of our jury system, to avoid a conflict with the decisions of other panels of the Circuit Court of Appeals regarding the burden placed on a moving party to overturn a jury's verdict, to protect the sanctity of F.R.Civ.P. 8(c) and 16(e), and in the manifest interests of justice, Judds requests that this Court grant its petition for certiorari.

REASONS FOR GRANTING THE WRIT

1. THE DISTRICT COURT'S ORDER VACATING A JURY VERDICT ON THE BASIS OF AN UNPLED AFFIRMATIVE DEFENSE AND SUA SPONTE CONSIDERATION OF A STATUTE OF FRAUDS VIOLATION, AND ITS AFFIRMANCE BY THE EIGHTH CIRCUIT COURT OF APPEALS, DENIED THE PETITIONER ITS FUNDAMENTAL RIGHTS TO DUE PROCESS OF LAW, GUARANTEED BY STATUTE AND THE UNITED STATES CONSTITUTION.

In its Memorandum Opinion granting the Burlington's Motion for Judgment as a Matter of Law, the trial court held *sua sponte* that the previously admitted evidence of an oral agreement between the parties should have been excluded because of the statute of frauds. (App., *infra*, 12-14). In so ruling, the trial court inexplicably departed from F.R.Civ.P. 16(e) and rule 16(c) of the Local Rules of the United States District Court for the District of Nebraska which requires that all controverted issues be listed in the pre-trial order as an affirmative

defense. The defense was not set forth in the pre-trial order as required by F.R.Civ.P. 16(e), (App., *infra*, 63-72), and was not even argued at trial.

The trial court correctly noted that in considering a JMAL "the Court must resolve all evidentiary conflicts in favor of the non-moving party" and can grant such a motion in those instances where "there is no legally sufficient evidentiary basis for a reasonable jury to find for the non-moving party." (App., *infra*, 8). However, both the trial court and the appellate court clearly erred and denied Judds its constitutional right to have the facts determined by a jury when they inexplicably vacated a breach of contract verdict on grounds never pled, never set forth in the pre-trial order and never even argued at trial. JMALs are highly disfavored, *U.S. ex rel. Yesudian v. Howard University*, 153 F.2d 731 (D.C. Cir. 1998), and should be granted only "when all evidence points one way and is susceptible of no reasonable inferences sustaining the position of the nonmoving party." *Ehrhardt v. Penn. Mut. Life Ins. Co.*, 21 F.3d 266 (8th Cir. 1994). The "purpose of the rule pertaining to contents of answers and requiring matters constituting avoidance or affirmative defenses to be affirmatively pleaded is to prevent surprise." *Lopez v. U.S. Fidelity & Guaranty Co.*, 18 F.R.D. 59 (D.C. 1955). How then can the constitutional right to a jury trial and to due process be protected when trial and appellate courts clearly err in reversing jury decisions on the basis of a trial court's sua sponte enforcement of non-pre-trial issues and non-argued affirmative defenses? The jury system, the notice requirements of federal pleading

rules, of F.R.Civ.P. 8(c) and F.R.Civ.P. 16(e), mean nothing if such clear constitutional and statutory error is permitted.

During the trial, the court received into evidence extensive and substantial testimony of the oral agreement reached between Judds and the Burlington in settlement of a prior dispute. (App., *infra*, 144-359). Under this agreement Judds was to be permitted to bid on future Burlington construction projects and to be awarded contracts on those projects in which Judds was the low bidder. This evidence, according to the standards of review applied in all other circuits, was to be considered in the light most favorable to Judds. The jury verdict awarded Judds should have been vacated only if there was no set of facts upon which to sustain it. The Burlington's own witness, the individual actually involved in making the agreement with Judds, clearly testified that this ability to bid on future contracts was an element of the agreement, and that, in fact, the Burlington took steps to insure that Judds no longer be "blackballed" by the Burlington. (App., *infra*, 289-290). This witness, Mr. William Glavin, testified that it was "absolutely not" his intention to preclude Judds from bidding on Burlington's work (App., *infra*, 288); and that "as part of the discussions that led to the settlement, Ray [Judds] had the ability to bid on other Burlington Northern projects" (App., *infra*, 288). This was "part of the settlement agreement that (he) was working – that (they) were reaching with Judds Brothers on January 16, 1990" (App., *infra*, 289-290). Yet this evidence of the parties *oral* agreement was, after having been submitted to the jury, totally

excluded and ignored by the trial court's *sua sponte* decision based on the unargued affirmative statute of frauds defense which was initially pled but then waived when the Burlington did not include it in the pre-trial order. This "now you see it, now you don't" evidentiary activity completely blindsided Judds, denied Judds a hearing to raise the 16(e) issues and to lay additional foundation, and has no place in our federal system of jury trials.

The trial court never even considered or addressed the clear and unambiguous violations of F.R.Civ.P. 8(c) and 16(e). Furthermore, when these fundamental and most egregious errors, which violated the very safeguards of our jury system as set forth in U.S. Const., Amend. VII, were brought to the attention of the Eighth Circuit Court of Appeals, it, for some unknown reason, failed anywhere in its 2½ page decision to specifically address or explain this issue. (App., *infra*, 1-3). To this day, there has never been any written consideration of these constitutional and statutory violations by any court. Judds' right to a trial by jury and to have the verdict in its favor protected by the Constitution of the United States and by F.R.Civ.P. 8(c) and 16(e) have been trampled – all without any judicial consideration and without application of the standard of review which is applied by every other Circuit Court of Appeals.

If appellate courts refuse to follow their own standard of review and refuse to enforce F.R.Civ.P. 8(c) and 16(e), then a citizen's constitutional rights to a jury trial under the Seventh Amendment is meaningless.

2. THE TRIAL COURT'S ORDER, VACATING A JURY VERDICT ON THE BASIS OF AN UNPLED PAROL EVIDENCE ISSUE NOT SET FORTH IN THE PLEADINGS OR PRETRIAL ORDER, AND THE AFFIRMANCE THEREOF BY THE APPELLATE COURT, DENIED THE PETITIONER ITS FUNDAMENTAL RIGHTS TO DUE PROCESS OF LAW, AS GUARANTEED BY STATUTES AND THE CONSTITUTION OF THESE UNITED STATES.

Judds trial argument that the agreement to allow Judds to bid on Burlington contracts and be awarded the same if it was the low bidder, was presented to the jury. Written evidence of such agreement was presented through trial Exhibits 81 and 85 (App., *infra*, 134-135, 138), and the jury was informed, in instruction no. 17 (App., *infra*, 111) that it could consider Exhibits 81 and 85 in determining, under instruction no. 15 (App., *infra*, 109-110), whether "an agreement" had been reached.

F.R.Civ.P. 8(c) requires that "any other matter constituting an avoidance or affirmative defense" must be pled. F.R.Civ.P. 16(e) demands that a pretrial order "shall" be entered in each case, and that such "order shall control the subsequent course of the action." A parol evidence issue or defense was never pled by the Burlington (App., *infra*, 37-41, 56-60), and was never included as a specific issue in the pretrial order. (App., *infra*, 63-72).

Shortly before trial, the Burlington presented a Motion In Limine which presented, for the first time, the issue of the parol evidence rule as a defense to whether Judds could offer any evidence of an "Agreement". (App., *infra*, 139-143). This motion, and the numerous identical objections made by the Burlington at trial, were

all overruled. As such, Judds had no indication that it was necessary to offer any further evidence regarding fraud or any other exceptions to the parol evidence (such as the fact that under Nebraska law the existence of a written instrument does not prevent a party from proving a distinct oral agreement which constitutes a condition on which the performance of the written agreement is to depend. *Perry v. Gross*, 155 Neb. 662, 53 N.W. 2d 73 (1952)). Indeed, based on the court's overruling of such objection, any further evidence on the issue was irrelevant and its receipt would probably have violated F.R.Evid. 403.

All during the trial, the District Court received testimony of the "Agreement" between Judds and the Burlington, and continually overruled Burlington's parol evidence objection and the Burlington's continuing objection. (App., *infra*, 160-162). The trial court continually received oral testimony relating to the meaning of the written documents (Exhibits 81 and 85), which were, as a matter of undisputed fact, drafted by the Burlington. That document was drafted by the Burlington at a meeting with Judds' president which took place after the Burlington suggested that a meeting be held, *without lawyers*, to work out the differences between the parties. (App., *infra*, 136-137). That document was, however, drafted after the Burlington's representative left the meeting on various occasions to confer with his in-house counsel. (App., *infra*, 285-286).

Thus, Judds, because of the parol evidence rulings made during the course of the trial was never put on notice that further evidence regarding the exceptions to the parol evidence rule was necessary. Of course, since

the statute of frauds defense was never mentioned by anyone before the judge's JMAL order, no notice of its applicability ever occurred and no evidence of any exceptions to this rule was specifically proffered. Incredibly however, the trial court, after uniformly overruling all parol evidence objections, stated in its post-trial opinion, for the first time, that the parol evidence rule was applicable since Judds "did not allege or offer any evidence of fraud or mistake . . . " (App., *infra*, 12). This followed the court's suggestion during trial that the issue of the parol evidence rule was not even in the case.[3]

In affirming the trial court's order, the Eighth Circuit Court of Appeals stated that Judds' constitutional challenge to the trial courts post-trial reversal of its evidentiary rulings was without merit. (App., *infra*, 3). This ruling conflicts with the holding of the Second Circuit Court of

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[3] During the second day of trial, Burlington's counsel and the trial court engaged in the following discussion:

> MR. CONFER: Your Honor, if – if I may respond to the – the court's inquiry I think – I think that is the crux of the issue here. What is this January 22, 1990 letter? And it's our position, and I think that Exhibit 81 says this, that the terms of the settlement are in the January 16, 1990 letter, and I – that letter seems to me to be quite unambiguous as the court has pointed out . . .
>
> . . .
>
> THE COURT: Well, I'm looking at the pretrial conference because I think the pretrial order supersedes the pleadings, and if it's not in the trial order, it's not in the case anymore, and I think that's our rule here in Nebraska.

(App., *infra*, 231-232).

Appeals in the case of *Doubleday & Co. v. Curtis*, 763 F.2d 495 (2d Cir. 1985).

In that case, a publisher brought suit against an author for recovery of an advance it had paid, and the author counterclaimed for anticipated earnings. *Id.* at 496. After a bench trial, the district court dismissed both actions, ruling that the publisher had waived its right to a return of the advance, despite the fact that the issue of waiver had not been pled. *Id.* at 500, 502.

On appeal, the Second Circuit Court of Appeals reversed the district court's dismissal of the publisher's action because the issue of waiver had not been raised. The court stated that by basing its dismissal of the publisher's claim on an issue that had not been raised, the district court denied the publisher due process of law, writing:

> Among the cardinal principles of our Anglo-American system of justice is the notion that the legal parameters of a given dispute are framed by the positions advanced by the adversaries, and may not be expanded *sua sponte* by the trial judge. The dismissal of Doubleday's claim based on an issue never pleaded by Curtis – or even implicitly raised at trial – is inconsistent with the due process concerns of adequate notice and an opportunity to be heard.
>
> . . . .
>
> The fact that certain evidence relating to the issues raised in the pleadings and pretrial order may have been relevant to a defense of waiver is inconsequential. We have previously noted that neither notice nor consent can fairly be inferred

> from such circumstances. Accordingly, we conclude that, in dismissing the complaint on the basis of waiver, the District Court violated Doubleday's right to fair notice.

Id. at 502, 503. *See Jimenez v. Tuna Vessel "Granada"*, 652 F.2d 415, 421 (5th Cir. 1981) ("[T]he introduction of such evidence gave this defendant no fair notice that new issues were thereby entering the case, issues that it must meet or suffer an adverse judgment. Nor did the court give defendant any indication that it contemplated a decision on such grounds. . . . ") *See also, Lavender v. Kurn*, 327 U.S. 645 (1946).

By basing its decision to grant the Burlington's Motion for Judgment as a Matter of Law on issues not raised in the pleadings, in the pre-trial order, or at trial, and by reversing its evidentiary rulings after conclusion of the trial, thus preventing Judds from presenting evidence on these issues, the District Court denied Judds its right to a jury trial and to due process of law. The trial court's action in this matter is analogous to a court overruling a hearsay objection, and then granting a motion for judgment as a matter of law because the evidence presented was inadmissible hearsay. There are numerous exceptions to the hearsay rule, but by reversing its rulings after conclusion of a trial, a court deprives a litigant of the opportunity to present other evidence, or to prove up any of the hearsay exceptions. Similarly, by overruling the Burlington's parol evidence rule objections, and then granting Burlington's motion for judgment as a matter of law on the basis that the evidence presented by Judds was inadmissible pursuant to that rule and the statute of frauds, the trial court deprived Judds of the opportunity

to present other evidence of fraud, mistake, ambiguity, waiver, non-integration or any other exception to the parol evidence rule and the statute of frauds.

CONCLUSION

A manifest injustice has been levied against Judds Brothers. In this instance, the trial and appellate courts nullified the factual findings of a 12 member jury, and vacated that jury's verdict on the basis of affirmative defenses and "other matters constituting an avoidance or affirmative defenses" which were not set forth in the pre-trial order. Such judicial interference with our jury system should never be tolerated, condoned, or allowed to stand as precedent. If the Supreme Court of this land will not step in to correct a trial and appellate courts' abrogation of F.R.Civ.P. 8(c) and 16(e); abrogation of a litigant's due process right to have a jury determine the "facts" of the case; and abrogation of the JMAL standard of all Circuit Courts of Appeal, then there simply is no "rule of law" to protect the average civil litigant of this country.

Judds respectfully requests that its Petition for Certiorari be granted, the opinions below vacated, the appeal dismissed, and the case remanded for entry of judgment in Judds' favor, or at the very least for a hearing to offer evidence to the court why F.R.Civ.P. 8(c) and 16(e) should be enforced and why many of the numerous exceptions to

both the parol evidence rule and the statute of frauds are applicable in this action.

Respectfully submitted,

JUDDS BROTHERS CONSTRUCTION COMPANY, Petitioner

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November, 1999

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 98-2678NE

Burlington Northern Railroad Company, a Delaware Corporation,	*	
Appellee,	*	On Appeal from the United States District Court for the District of Nebraska.
v.	*	
Judds Brothers Construction Company, a Nebraska Corporation,	*	
Appellant.	*	

Submitted: April 21, 1999
Filed: July 9, 1999

Before RICHARD S. ARNOLD and WOLLMAN,[1] Circuit Judges, and WOLLE,[2] District Judge.

RICHARD S. ARNOLD, Circuit Judge.

Judds Brothers Construction Company prevailed at trial in this case and obtained a jury verdict for damages

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[1] The Honorable Roger L. Wollman became Chief Judge of this Court on April 24, 1999.

[2] The Honorable Charles R. Wolle, United States District Judge for the Southern District of Iowa, sitting by designation.

on its counterclaim for breach of contract against Burlington Northern Railroad Company. The District Court[3] granted Burlington Northern's motion for judgment as a matter of law and vacated the jury verdict. Judds Brothers appeals, and we affirm.

Judds Brothers' counterclaim was based on a written settlement agreement it entered into with Burlington Northern that resolved a dispute over a construction project Judds performed at one of Burlington's facilities. According to Judds, as part of the settlement Burlington agreed to reinstate Judds as a supplier of construction services and allow Judds to bid on all of Burlington's future construction projects which Judds could feasibly perform. In addition, Judds contends that Burlington agreed that if Judds was the low bidder on any of these projects, then it would be awarded the contract. Judds claims that Burlington broke this agreement when it failed to allow Judds to bid on several projects and also refused to award Judds two contracts on which it was the low bidder.

It is undisputed that nothing in the written agreement can be construed as providing for the terms Judds alleges.[4] At trial, Judds attempted to supplement the

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[3] The Hon. Lyle E. Strom, United States District Judge for the District of Nebraska.

[4] The agreement states only that Burlington would write "a letter indicating that the litigation here resulted from a misunderstanding between the parties and that the controversy has been resolved to the mutual satisfaction of Burlington Northern and Judds Brothers." The letter, which was written shortly after the agreement was signed, was addressed "To

written agreement with extrinsic evidence of these additional terms. After hearing all of the evidence, the District Court held that the written agreement was the only competent evidence of the terms of the settlement, and concluded that Burlington was entitled to judgment as matter of law.

Most of the arguments urged on appeal involve the application of general principles of Nebraska contract law. These issues were ably addressed by the District Court's memorandum opinion, and we see no reason to undertake a protracted discussion on the subject. As for the appellant's constitutional challenge and any other arguments not addressed by the District Court's opinion, we have thoroughly examined the record and the transcripts and find these issues to be without merit.

Affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

Whom It May Concern:" and states that "Judds Brothers Construction continues to be a supplier of construction services to the Burlington Northern Railroad. Judds has also provided tie rehabilitation service to the Burlington Northern since 1987."

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

BURLINGTON NORTHERN RAILROAD COMPANY, Plaintiff, v. JUDDS BROS. CONSTRUCTION COMPANY, Defendant.	4:CV95-3113 ORDER AND JUDGMENT

Pursuant to the memorandum opinion entered herein this date,

IT IS ORDERED:

1) Defendant Burlington Northern Santa Fe Railway's motion for judgment as a matter of law (Filing No. 66) is granted.

2) The jury verdict (Filing No. 61) and the judgment entered thereon (Filing No. 64) are vacated.

3) Plaintiff Judds Brother Construction Company's counterclaims are dismissed.

DATED this 3rd day of June, 1998.

BY THE COURT:

/s/ Lyle E. Strom
LYLE E. STROM, Senior Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

BURLINGTON NORTHERN RAILROAD COMPANY, Plaintiff, v. JUDDS BROS. CONSTRUCTION COMPANY, Defendant.	4:CV95-3113 MEMORANDUM OPINION

This matter is before the Court on plaintiff, Burlington Northern Santa Fe Railway's (Burlington), motion for judgment as a matter of law, or in the alternative, for a new trial (Filing No. 66). The plaintiff's claim was settled prior to trial. Defendant, Judds Brothers Construction Company's (Judds) counterclaim was tried to a jury. On April 7, 1998, the jury found for the defendant and awarded it $791,232.05 in damages. Judgment on the verdict was entered on April 10, 1998 (Filing No. 64). For the reasons set forth below, Burlington's motion for judgment as a matter of law is granted and the jury's verdict is set aside.

I. BACKGROUND

Burlington operates an interstate railroad with facilities in Nebraska. Judds is a general contractor that has

performed various services for Burlington. In 1987, Burlington contracted with Judds to perform a construction project at Burlington's Gibson Yards facility in Omaha, Nebraska. A dispute arose between the parties regarding the quality of certain aspects of the project and litigation followed. On January 16, 1990, Judds' president, Ray Judds, met with William Glavin, Burlington's System Chief Engineer, and agreed to settle the dispute. The parties signed a letter agreement. Exhibit 81, memorializing the settlement.[1] The settlement agreement terms were

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[1] Exhibit 81 is a letter dated January 16, 1990, that states as follows:

> This will confirm an understanding you and I reached today to settle all litigation arising out of the construction of the Gibson Yard intermodal facility at Omaha, Nebraska. (sic) It is agreed as follows:
>
> A) Burlington Northern will satisfy all outstanding claims for materials furnished for this job. Consolidated Mixing will be paid in the full amount outstanding (approximately $87,000.00).
>
> B) Burlington Northern will pay Judds Brothers the sum of $250,000.00.
>
> C) All claims are released and all litigation dismissed in any way arising out of the project without further cost or expense to either party. The lawyers will take the action necessary to accomplish this.
>
> D) I will write you a letter indicating that the litigation here resulted from a misunderstanding between the parties and that the controversy has been resolved to the mutual satisfaction of Burlington Northern and Judds Brothers.
>
> E) Representatives of both parties will keep the settlement terms strictly confidential.

to be kept confidential and the letter agreement required Burlington to write an additional letter for Judds to show to its bonding company and creditors indicating that the litigation had been settled to the mutual satisfaction of both parties. The following week, Burlington wrote the letter, Exhibit 85, and delivered it to Judds.[2]

Judds alleges that Burlington agreed as part of the settlement agreement to reinstate Judds as a supplier of construction services. Judds claims that as such a supplier, it would be given the opportunity to bid on all

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If the above terms are acceptable to Judds Brother, please indicate by signing on the line below and returning one copy to me.

Yours very truly,

/s/ William E. Glavin /s/ Ray Judds

[2] Exhibit 85, dated January 22, 1990, states as follows:

TO WHOM IT MAY CONCERN:

Please be advised that all litigation surrounding the Intermodal Hub Construction Project at Burlington Northern's Gibson Yards in Omaha, Nebraska, has been settled to the satisfaction of the parties. The lawsuits associated with this project arose from a misunderstanding of properties and capabilities of Roller Compacted Concrete; specifically in conjunction with adverse subgrade moisture conditions.

Judds Brothers Construction continues to be a supplier of construction services to the Burlington Northern Railroad. Judds has also provided tie rehabilitation service to the Burlington Northern since 1987.

Sincerely,

/s/ William Glavin

Burlington construction projects it could feasibly perform, and if Judds was the low bidder, it would be awarded the contract for the project. In its counterclaim, Judds alleges that Burlington breached the settlement agreement by not giving Judds the opportunity to bid on all Burlington construction projects Judds was capable of performing and by not awarding it the contract for two projects for which Judds submitted the lowest bid.

Burlington denies that it agreed to give Judds the opportunity to bid on all Burlington projects Judds was capable of performing and denies that it guaranteed to award Judds any contract on which Judds was the low bidder. Burlington asserted throughout trial that Exhibits 81 and 85 were unambiguous and objected to the admission of parole evidence.

II. DISCUSSION

Fed. R. Civ. P. 50, provides that the Court may grant a motion for judgment as a matter of law against a party if there is no legally sufficient evidentiary basis for a reasonable jury to find for the non-moving party. In ruling on such a motion, the Court must resolve all evidentiary conflicts in favor of the non-moving party. *BE & K Constr. Co. v. United Brotherhood of Carpenters & Joiners*, 90 F.3d 1318, 1326 (8th Cir. 1996). Further, Fed. R. Civ. P. 50(b) states:

> If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant

> may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment – and may alternatively request a new trial or join a motion for a new trial under Rule 59.

Burlington moved for judgment as a matter of law at trial and renews its request for judgment on the basis that there is no legally sufficient evidence to support any claim against it. Burlington essentially makes two arguments. First, it reasserts its argument that Exhibits 81 and 85 are unambiguous and, as a result, any parol evidence or evidence of an oral agreement is inadmissible. Second, Burlington claims Judds failed to prove damages with the level of certainty required by Nebraska law. In response, Judds argues that Burlington waived the right to renew its motion for judgment as a matter of law because it failed to make such a motion at the close of all of the evidence. Judds also asserts that the Court properly admitted extrinsic evidence of the settlement agreement and that there was sufficient evidence to establish damages.

A. Waiver

At the end of Judds' case, Burlington moved for judgment as a matter of law. Burlington renewed this motion at the end of its case, at which time the Court took the motion under advisement. For rebuttal, Judds did not present any additional witness testimony, however they offered five exhibits. The Court received two exhibits into evidence immediately. With respect to the remaining three, the Court needed time to review the exhibits and

reserved ruling on them. At the jury instruction conference, the Court ruled that the three exhibits were improper rebuttal and as such were inadmissible. Burlington did not formally renew its motion at that time; however, it made objections to the jury instructions that were consistent with its motion for directed verdict.

Generally, "if a party does not move for judgment as a matter of law at the close of all the evidence, it normally cannot later argue that there was insufficient evidence to support the verdict." *Id.* at 1326 citing *Pulla v. Amoco Oil Co.*, 72 F.3d 648, 655 (8th Cir. 1995). However, there are exceptions to the rule. *Id.* at 1325. In *BE & K*, the Eighth Circuit pointed out that an exception is recognized when

> 1) the district court defers ruling on the motion, 2) no evidence related to the claim comes in after the motion, and 3) very little time passes between the motion and the close of the evidence.

Id. (internal citations omitted).

This case clearly falls within this exception. When Burlington renewed its motion at the end of its case, the Court reserved ruling on the motion. Judds' entire rebuttal took a matter of minutes and was no more than the admission of two exhibits without any further testimony. One of the exhibits was an extract of an earlier exhibit that had already been published and the other was a document admitted to show the potential interest of two of Burlington's witnesses. Thus, the Court finds Burlington's Rule 50(b) motion is properly before it.

B. Extrinsic Evidence

Burlington has consistently argued that the admission of extrinsic evidence was improper, and that without such evidence, there was no legally sufficient evidence to support Judds' claim. Under Nebraska law, settlement agreements are subject to the general principles of contract law. *Woodmen of the World Life Ins. Soc'y v. Knight*, 46 Neb. 619, 522 N.W.2d 155 (1994); *Heese Produce Co. v. Lueders*, 233 Neb. 12, 18, 443 N.W.2d 278, 282 (1989). Parol evidence is not admissible when a contract is unambiguous, rather, the parties intent must be determined from the contents of the contract itself. *Krzycki v. Genoa Nat'l Bank*, 242 Neb. 819, 826, 496 N.W.2d 916, 921 (1993). A contract is ambiguous "if a word, phrase, or provision in the instrument has, or is susceptible of, at least two reasonable but conflicting interpretations or meanings." *Id.* However, "[t]he fact that parties to a document have or suggest opposing interpretation of the [contract] does not necessarily, or by itself, compel the conclusion that the [contract] is ambiguous." *Id.* Finally, "[t]he meaning of an unambiguous contract is a matter of law." *Kropp v. Grand Island Pub. Sch. Dist.*, 246 Neb. 138, 141-2, 517 N.W. 2d 113, 115 (1994).

Applying these principles, the Court finds, as a matter of law, that there is no ambiguity in the language of Exhibits 81 or 85. The parties agreed to the settlement terms contained in paragraphs A through E of Exhibit 81. None of these paragraphs contain any language regarding a promise by Burlington that Judds would be allowed to bid on all Burlington construction projects Judds could feasibly perform or that Judds would automatically be awarded a contract if it was the low bidder on a project.

Exhibit 85 is the letter Burlington agreed to write pursuant to paragraph D of Exhibit 81. Exhibit 85 is not part of the contents of the contract. Rather, it is evidence of performance of the agreement. Regardless, nothing in Exhibit 85 indicates Burlington made the promises Judds alleges. Thus, there is no written agreement containing the terms Judds alleges.

Judds also argues that the parties entered into a series of agreements during their January 16, 1990, negotiations that included an oral or implied agreement by Burlington to allow Judds to bid on all construction projects Judds could feasibly perform and award it the contract if it was the low bidder on a project. This argument is contrary to the well established principle that "[w]here negotiations between parties result in an agreement which is reduced to writing, the written agreement is the only competent evidence of the contract in the absence of fraud, mistake, or ambiguity. *Rowe v. Allely*, 244 Neb. 484, 486, 507 NW.2d 293, 296 (1993), *see also Schommer v. Bergfield*, 178 Neb. 140, 132 N.W.2d 1345 (1965). The first paragraph of Exhibit 81 states that the letter is to confirm the agreement the parties reached and in effect reduce it to writing. Judds did not allege or offer any evidence of fraud or mistake and, as stated above, there is no ambiguity. Thus, any evidence of an oral or implied agreement is inadmissible.

Furthermore, even if there was sufficient evidence to establish an oral or implied contract, the contract would be unenforceable under the Nebraska Statute of Frauds. Neb. Rev Stat. § 36-202 (Reissue 1993) provides:

> In the following cases every agreement shall be void, unless such agreement or note or memorandum thereof, be in writing, and subscribed by the party to be charged therewith:
>
> (1) Every agreement that, by its terms, is not to be performed within one year from the making thereof;
>
> . . .

The oral contract was to begin on January 16, 1990, and continue for a period exceeding one year. Thus, the Statute of frauds would render the contract void. However, Nebraska law provides that an oral contract may still be enforced "if there is a written memorandum of the agreement sufficient to take the contract out of the Statute of Frauds." *Ancom, Inc. v. E.R. Squibb & Sons, Inc.*, 658 F.2d 650, 651-52 (1981). While the written memorandum does not have to contain "the terms and conditions of all the promises constituting the contract," it must include all of the "essential" or "integral" terms in order to be enforceable. *Id.*

Exhibits 81 and 85 do not contain all or even any of the essential terms of the alleged oral agreement. First, they do not indicate that Judds must be given the opportunity to bid on all Burlington projects it was capable of performing. This is an integral term in light of the fact that Burlington did invite Judds to bid on some of the projects Burlington thought Judds was capable of performing. Second, there is no language in the exhibits requiring Burlington to award Judds the contract on projects on which it was the low bidder. Generally, when a corporation requests bids for construction projects, it is not obligated to accept the low bid. *See* 17 C.J.S. Contracts

§ 48. In its invitations to bid. Burlington reserved the right to award the bid to a contractor other than the low bidder. Thus, the requirement that Judds be awarded the contract if they were the low bidder is crucial, because without it, Judds had no independent right to be awarded any contract if it was the low bidder. Finally, the duration of the agreement is an essential element, and no such term is contained in any document. Without such term, Burlington's obligation could continue *ad infinitum*.

CONCLUSION

For the foregoing reasons, the Court finds that Burlington is entitled to judgment as a matter of law.[3] A separate order will be entered in accordance with this opinion.

DATED this 3rd day of June, 1998.

BY THE COURT:

/s/ Lyle E Strom
LYLE E. STROM, Senior Judge
United States District Court

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[3] Having found that Burlington is entitled to judgment as a matter of law, it is unnecessary to address Burlington's damages argument.

TERMED APPEAL

U.S. District Court
U.S. District Court for the District of Nebraska (Lincoln)

CIVIL DOCKET FOR CASE #: 95-CV-3113

BNRR v. Atlas Company, et al
Assigned to: Judge Lyle E. Strom
Demand: $0,000
Lead Docket: None
Dkt # in USDC-CO : is 95N186

Filed: 03/27/95
Jury demand: Defendant
Nature of Suit: 140
Jurisdiction: Diversity

Cause: 28:1332 Diversity-Negotiable Instrument

BURLINGTON NORTHERN RAILROAD COMPANY, a Delaware corporation,

plaintiff

Rodney M. Confer
[COR LD NTC ret]
KNUDSEN, BERKHEIMER LAW FIRM
1000 NBC Center
1248 O Street
Lincoln, NE 68508
(402) 475-7011

Walter J. Downing
[COR LD NTC]
KNUDSEN, BERKHEIMER LAW FIRM
1401 17th Street
Suite 510
Denver, CO 80202
(303) 295-4250
FTS 295-4243

v.

ATLAS COMPANY OF LINCOLN, Nebraska corporation defendant	William G. Dittrick [COR LD NTC] BAIRD, HOLM LAW FIRM 1500 Woodmen Tower Omaha, NE 68102-2068 (402) 344-0500 FTS 344-0588 Dean F. Suing [COR LD NTC ret] KATSKEE, HENATSCH LAW FIRM 10404 Essex Court Suite 100 Omaha, NE 68114 (402) 391-1697
JUDDS BROTHERS CONSTRUCTION COMPANY, Nebraska corporation defendant	
----------	Dean F. Suing (See above)
ATLAS COMPANY OF LINCOLN, Nebraska corporation counter-claimant	
JUDDS BROTHERS CONSTRUCTION COMPANY, Nebraska Corporation counter-claimant	
v.	
BURLINGTON NORTHERN RAILROAD COMPANY, a Delaware corporation counter-defendant	

METRO MEDIATION CENTER mediator [term 07/15/97]	Metro Mediation Center [term 07/15/97] [COR LD NTC] [PRO SE] 2522 North 24th Omaha, NE 68110 (402) 444-1970
ATLAS COMPANY OF LINCOLN counter-claimant	William G. Dittrick [COR LD NTC] BAIRD, HOLM LAW FIRM 1500 Woodmen Tower Omaha, NE 68102-2068 (402) 344-0500 FTS 344-0588 Dean F. Suing [COR LD NTC ret] KATSKEE, HENATSCH LAW FIRM 10404 Essex Court Suite 100 Omaha, NE 68114 (402) 391-1697
v.	
BURLINGTON NORTHERN RAILROAD COMPANY counter-defendant	Walter J. Downing [COR LD NTC] KNUDSEN, BERKHEIMER LAW FIRM 1401 17th Street Suite 510 Denver, CO 80202 (303) 295-4250 FTS 295-4243

BURLINGTON NORTHERN RAILROAD COMPANY, a Delaware corporation,

plaintiff

v.

ATLAS COMPANY OF LINCOLN, Nebraska corporation; JUDDS BROTHERS CONSTRUCTION COMPANY, Nebraska corporation

defendant

ATLAS COMPANY OF LINCOLN, Nebraska corporation; JUDDS BROTHERS CONSTRUCTION COMPANY, Nebraska Corporation;

counter-claimant

BURLINGTON NORTHERN RAILROAD COMPANY, a Delaware corporation

counter-defendant

METRO MEDIATION CENTER

mediator

ATLAS COMPANY OF LINCOLN,

counter-claimant

BURLINGTON NORTHERN RAILROAD COMPANY

counter-defendant

3/27/95	1	ORDER by Magistrate Judge O. Edward Schlatter transferring case from Colorado to the District of Nebraska with original pldgs received from U.S. District of Colorado consisting of 18 pldgs and certified copy of order #19 per docket sheets attached – Letter notice of transfer sent to counsel of record on 3/29/95 (ccb) [Entry date 03/28/99]
4/5/95	2	ATTORNEY APPEARANCE for defendant and counter-claimant Atlas Company; atty Dean F. Suing (ccb)
4/12/95	3	ORDER by Magistrate David L. Piester grt P's mot for def stmt (fil 16 in orig file); ddl for amended counterclaim set for 10 days – CCAP (jfm)
4/12/95	4	SCEDULING PACKET by Magistrate David L. Piester. CCAP w packet. (knn) [Entry date 04/13/95]
5/10/95	5	ANSWER and AMENDED COUNTERCLAIM; jury demand by defendant Atlas Company against plaintiff BNRR (etc)

6/6/95	6	PROGRESSION/SCHEDULING ORDER Magistrate David L. Piester; Discovery set for 3/27/96; pretrial conf set for 9:00 4/10/96 before Magistrate David L. Piester; jury trial set for 5/96 sessn (with report of planning meeting attch'd) – CCAP (knn) [Entry date 06/07/95]
11/27/95	7	MOTION (Stipulation) by plaintiff, defendants to dismiss (ccb) [Entry date 11/28/95]
11/29/95	8	ORDER by Judge Richard G. Kopf granting stipulation to dismiss [7-1] dismissing plf's complaint only and further proceedings be had with regard to amend counterclaim of dfts – COPIES MAILED (ccb) [Edit date 05/16/97]
2/29/96	9	MOTION by defendant Judds Brothers, defendant Atlas Company to extend pretrial progression order (plw) [Entry date 03/01/96]
3/1/96	–	TRANSMITTAL of documents [9-1] to Lincoln Clk's office plw
3/25/96	10	ORDER by Magistrate David L. Piester granting dfts' motion to extend pretrial progression order [9-1]; Discovery set for 5/17/96; Pretrial conference will be held 5/24/96 at 12:15 p.m.; Jury trial is set to commence at 9:00 a.m. at 6/10/96 for 5 days, jury selection will be held at commencement of trial – COPIES MAILED (ccb)

4/3/96	11	CERTIFICATE of service by plaintiff BNRR of first set of interrogs and reqs for production and a copy of this certif (ccb)
4/23/96	12	ANSWER TO COUNTERCLAIM [5-2] by counter-defendant BNRR (jfm) [Entry date 04/24/96]
5/3/96	13	REPLY by defendant Judds Brothers to Plf's "Reply to Counterclaim" (Answer) [12-1] (plw)
5/3/96	–	TRANSMITTAL of documents [13-1] to Lincoln Clk's office (plw)
5/7/96	14	CERTIFICATE of service by plaintiff BNRR of answers to dft's first set of interrogs and plf's resps to dft's reqs for production of docs (ccb) [Entry date 05/08/96]
5/7/96	15	MOTION by plaintiff BNRR to continue progression (ccb) [Entry date 05/08/96]
5/8/96	16	NOTICE by defendants of consent to plf's motion for continuance of progression (ccb) [Entry date 05/09/96]
5/10/96	17	ORDER by Magistrate David L. Piester granting motion to continue progression [15-1]; Discovery set for 9/17/96; Pretrial conference set 9/18/96 at 10:00 a.m.; Jury trial is contd to October, 1996. – COPIES MAILED (ccb)

5/20/96	18	CERTIFICATE OF SERVICE by plaintiff BNRR of Plf's Supplemental Disclosures. (jlr)
8/21/96	19	MEMORANDUM AND ORDER: by Magistrate Judge David L. Piester that parties shall report to the court in accordance with the progression order w/i 10 days - COPIES MAILED (ccb)
9/13/96	20	MOTION by defendant Judds Brothers, defendant Atlas Company for extension & continuance of pretrial conference & deadlines and for order of mediation (plw)
9/18/96	21	MEDIATION REFERENCE ORDER by Magistrate Judge David L. Piester - case is referred to MMC - objection to this order shall be submitted w/in 7 working days; case is stayed until further order of the court. COPIES MAILED (knn)
11/26/96	22	MOTION by plaintiff, defendants to extend time to complete mediation (ccb) [Entry date 11/27/96]
12/2/96	23	ORDER by Magistrate Judge David L. Piester granting motion to extend time to complete mediation to 1/17/97 [22-1], [20-1] - COPIES MAILED (ccb)
1/29/97	24	MOTION by plaintiff, defendants to continue mediation reference order to 4/22/97 (ccb)

1/29/97	25	ORDER by Magistrate Judge David L. Piester granting stipulated motion to continue mediation reference order to 4/22/97 [24-1] – COPIES MAILED (ccb)
6/25/97	26	MOTION by plaintiff BNRR to establish progression schedule (jlr) [Entry date 06/27/97]
7/15/97	27	MEDIATION CLOSURE NOTICE by Metro Mediation Center; mediation scheduled on 1/17/97 and cont for a second session on 2/3/97; no agreement (jlr) [Entry date 07/16/97]
7/21/97	28	ORDER by Magistrate Judge David L. Piester; Discovery set for 11/26/97; Pretrial conference will be held 12/10/97 at 3:00 p.m.; Jury trial is cont to 1/98 jury session – COPIES MAILED (jlr)
10/30/97	29	ORDER by Chief Judge William G. Cambridge Case reassigned to Judge Lyle E. Strom; Magistrate Judge Piester shall continue as the Magistrate Judge assigned to handle pretrial matters as referred to him by Judge Strom – COPIES MAILED (etc)
10/30/97	–	TRANSMITTAL of documents [29-1] to Lincoln. (etc)
11/5/97	–	FILE SENT to Omaha (ccb)

11/12/97	30	NOTICE by defendant Atlas Company, defendant Judds Brothers of taking deposition of William Glavin, Jack Moy, Trent Hudak, Jerry Helms and Gerald Albin on November 24, 25 and 26 1997 (tls)
12/4/97	–	FILE SENT to Lincoln clerk's office for Magistrate Judge Piester (gjh)
12/11/97	31	PRE-TRIAL ORDER by Magistrate Judge David L. Piester: PTC held; jury trial set at court's call for 2/98 estimated length of trial 5 days – COPIES MAILED (jfm)
12/11/97	–	FILE SENT to Omaha (jfm)
1/23/98	32	AMENDMENT TO EXHIBIT LIST; with amendments attached (jlr)
1/26/98	33	ORDER by Judge Lyle E. Strom Jury trial is set for 3/30 98 at 9:00 a.m. – COPIES MAILED (tls)
1/27/98	–	TRANSMITTAL of documents [32-1] to Omaha (jlr)
2/5/98	34	CERTIFICATE by court reporter of taking depo of Jack D. Moy on 1/16/98 (jlr) [Edit date 02/06/98]
2/5/98	35	CERTIFICATE by court reporter of taking depo of Patrick Barclay on 1/16/98 at 10:00 a.m. (jlr)
2/5/98	–	TRANSMITTAL of documents [35-1], [34-1] to Omaha (jlr)
2/17/98	36	CERTIFICATE by court reporter of taking the depo of Kevin Steele (tls) [Entry date 02/23/98]

2/26/98	37	CERTIFICATE by court reporter of taking the depo of Trent M. Hudak (tls) [Entry date 02/27/98]
3/2/98	39	CERTIFICATE by court reporter of taking depo of Ray E. Judds on 1/26/98 (jlr) [Entry date 03/10/98]
3/2/98	40	CERTIFICATE by court reporter of taking depo of William E. Glavin on 1/26/98 (jlr) [Entry date 03/10/98]
3/2/98	41	CERTIFICATE by court reporter of taking depo of John R. Judds on 1/27/98 (jlr) [Entry date 03/10/98]
3/6/98	38	Amendment to EXHIBIT LIST by defendant Judds Brothers (knn) [Entry date 03/09/98]
3/13/98	42	Amendment to EXHIBIT LIST by defendant Judds Brothers (knn)
3/20/98	43	NOTICE by defendant Judds Brothers of designation of deposition testimony of dft Judds Brothers Construction Company (jlr)
3/23/98	44	NOTICE by plaintiff BNRR of designation of deposition testimony of BNRR Company (jlr) [Entry date 03/24/98]
3/23/98	45	OBJECTION by plaintiff BNRR to depo testimony and counter designations (jlr) [Entry date 03/24/98]
3/26/98	46	AMENDMENT TO EXHIBIT LIST by defendant Judds Brothers, counter-claimant Judds Brothers (cjc)

3/26/98	47	MOTION by plaintiff BNRR in limine, with attachments (knn)
3/26/98	48	AFFIDAVIT of Coray L. Stull in support of plf's motion in limine [47-1] (knn)
3/27/98	49	JURY INSTRUCTIONS submitted by plaintiff BNRR (jlr) [Entry date 03/30/98]
3/27/98	50	MOTION by plaintiff BNRR in limine requests the court to order dft's cnsl to instruct his witnesses to make no reference in regard to lawsuit involving Gibson Yards and BNSF's lawsuit to recover indemnification (jlr) [Entry date 03/30/98]
3/30/98	51	PROPOSED JURY INSTRUCTIONS (Set I) submitted by defendant Atlas Company, defendant Judds Brothers (jlr) [Entry date 03/31/98]
3/31/98	52	MINUTES: before Judge Lyle E. Strom – Court Reporter: Rogene S. Schroder court trial began; jury empaneled; opening stmts; evidence by plf and dft; trial not concluded – cont to 3/31/98 at 9:00 a.m.; oral motion by dft to sequester witnesses is granted; no written order forthcoming terminating magistrate referral (jlr) [Edit date 04/09/98]
3/31/98	53	JURY PANEL RECORD (jlr)

3/31/98	54	MINUTES: before Judge Lyle E. Strom – Court Reporter: Rogene S. Schroder, civil trial resumed; evidence by plf and dft; trial not concluded – cont to 4/1/98 at 9:00 a.m. (jlr) [Entry date 04/01/98]
4/1/98	55	MINUTES: before Judge Lyle E. Strom – Court Reporter: Rogene S. Schroder; civil trial resumed; evidence by Plf; trial not concluded – continued to 4/2/98 at 9:00 a.m. (cjc) [Entry date 04/02/98] [Edit date 04/07/98]
4/2/98	56	MINUTES: before Judge Lyle E. Strom – Court Reporter: Rogene S. Schroder; civil trial resumed; evidence by Plf and Dft; Plf rests; trial not concluded – continued to 4/3/98 at 9:00 a.m.; oral motion by Dft for a directed verdict or in the alternative, judgment as a matter of law is over-ruled; no written order forthcoming (cjc) [Entry date 04/03/98]
4/3/98	58	MINUTES: before Judge Lyle E. Strom – Court Reporter: Rogene S. Schroder; civil trial resumed; evidence by Dft; trial not concluded – continued to 4/6/98 at 11:00 a.m.; oral motion by Dft for a directed verdict or in the alternative, judgment as a matter of law is overruled; no written order forthcoming (cjc) [Entry date 04/06/98] [Edit date 04/08/98]

4/6/98	57	PROPOSED JURY INSTRUCTIONS submitted by defendant Judds Brothers (Set II) (cjc)
4/7/98	59	MINUTES – 4/6/98: before Judge Lyle E. Strom – Court Reporter: Rogene S. Schroder; trial resumed; evidence by dft dft rests; closing arguments; instruction conference; jury received case 4:35; jury returned 5:15 w/out verdict; it is ordered to resume deliberations on 4/7/98 9:00; civil trial ended; 6 days of trial w/evidence (kqp) [Edit date 04/08/98]
4/7/98	60	COURT'S CHARGE TO JURY (ccb)
4/7/98	61	VERDICT for counter-claimant Judds Brothers against counter-defendant BNRR (kqp) [Entry date 04/08/98]
4/8/98	62	MINUTES: before Judge Lyle E. Strom jury resumed deliberations on 4/7/98 at 9:00 a.m., verdict received at 4:00 p.m. for plf, clerk to file verdict, but w/hold entry of jgm until further order (tls)
4/8/98	63	EXHIBIT LIST from hearing held on 3/30/98 to 4/6/98 (tls)
4/10/98	64	JUDGMENT by Clerk jgm is entered in favor of the plf and against the dft in the amount of $791,232.05 together with the plf's costs herein – COPIES MAILED (tls) [Entry date 04/13/98]

4/15/98	65	MOTION by plaintiff BNRR to stay execution of judgment pending disposition of its mtn for judgment and alternative mtn for a new trial (kqp)
4/15/98	66	MOTION by plaintiff BNRR for judgment as a matter of law, or in the alternative for new trial (kqp)
4/17/98	67	BILL OF COSTS submitted by defendant Judds Brothers re judgment [64-3] (tls) [Entry date 04/20/98]
4/20/98	68	NOTICE by defendant Judds Brothers of telephonic hrg re: costs (tls) [Entry date 04/21/98]
4/21/98	69	ORDER by Judge Lyle E. Strom the court being duly advised in the premises, is hereby ordered that execution of the jgm and any proceedings to enforce the jgm are hereby stayed pending disposition of the dft's post-trial mtns and that dft shall not be required to post any security pending resolution of dft's post-trial mtns – COPIES MAILED (tls) [Entry date 04/22/98]
4/24/98	70	MOTION by plaintiff BNRR, counter-defendant BNRR, counter-defendant BNRR for leave to submit a reply brief on mtn for a judgment as a matter of law (kqp) [Entry date 04/27/98]

4/27/98	71	ORDER by Judge Lyle E. Strom granting motion for leave to submit a reply brief on mtn for a judgment as a matter of law [70-1] – COPIES MAILED (tls) [Entry date 04/28/98]
5/4/98	72	WITNESS LIST from hearing held on March 30, 31, April 1, 2, 3, 6, 1998. (cjs)
5/20/98	73	BILL OF COSTS submitted by defendant Judds Brothers re judgment [64-3] (tls)
6/4/98	74	MEMORANDUM OPINION: by Judge Lyle E. Strom the court finds that Burlington is entitled to jgm as a matter of law. A separate order will be entered in accordance with this opinion – COPIES MAILED (tls)
6/4/98	75	JUDGMENT by Judge Lyle E. Strom granting motion for judgment as a matter of law [66-1], the jury verdict [61-1] and the jgm entered thereon [64-3] are vacated and plf Judds Brother Construction Company's counterclaims are dismissed – COPIES MAILED (tls) [Entry date 06/05/98]
6/19/98	76	NOTICE OF APPEAL by defendant Judds Brothers from District Court Memorandum Opinion [74-1] and Judgment [75-1] – COPIES MAILED (lfs) [Entry date 06/22/98]

6/19/98	–	RECEIPT for Appeal fee from defendant Judds Brothers in the amount of $ 105.00 (Receipt #81116) re: notice of appeal [76-1] (lfs) [Entry date 06/22/98]
6/19/98	77	REQUEST FOR TRANSCRIPT by defendant Judds Brothers for all parts of the trial not already on file – cc: Court Reporter, Rogene Schroder (lfs) [Entry date 06/22/98]
6/19/98	78	PROOF OF SERVICE by defendant Judds Brothers of serving a copy of Appellant's Form A with attachment (Partial List of Issues on Appeal), an original of Appellee's Form B, and a copy of the Notice of Appeal (lfs) [Entry date 06/22/98]
6/19/98	79	APPELLANT'S DESIGNATION OF EXHIBITS by defendant and counter-claimant Judds Brothers purssuant to 8th Circuit R. App. P. 30A(B)(5) (lfs) [Entry date 06/23/98] [Edit date 06/23/98]
6/23/98	80	2 CERTIFIED COPIES of notice of appeal [76-1], memorandum opinion [74-1], order and judgment [75-1], judgment [64-3], verdict [61-1] and clerk's docket entries mailed to Clerk, USCA 8th Circuit; docket entries also mailed to attys of record (lfs) [Edit date 06/23/98]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

CIVIL ACTION NO. 95-N-186

BURLINGTON NORTHERN RAILROAD COMPANY, a Delaware corporation,

Plaintiff,

vs.

ATLAS COMPANY OF LINCOLN, a Nebraska corporation,

Defendant,

and

JUDDS BROTHERS CONSTRUCTION COMPANY, a Nebraska corporation,

Defendant,

NOTICE OF REMOVAL PURSUANT TO 28 U.S.C. 1441 and CERTIFICATE OF SERVICE

(Filed Jan. 25, 1995)

Defendants, Atlas Company Of Lincoln, and Judds Brothers Construction Company, by and through their attorneys Robert B. Douglas & Associates, file their Notice of Removal Pursuant to 28 U.S.C. 1441 as follows:

BASIS FOR REMOVAL

1. The Plaintiff is a Delaware corporation.

2. Defendants are Nebraska corporations with their place of principal business in the state of Nebraska.

3. The amount in controversy, excluding interest and costs, exceeds the sum or value of Fifty Thousand Dollars ($50,000.00).

STATE COURT ACTION PARTICULARS

4. The Plaintiff filed its complaint against the Defendants on January 5, 1995 in the Denver District Court, State of Colorado as Civil Action No. '95 CV 36.

5. Defendants have not answered nor filed any pleading in the state court action.

6. A copy of all pleadings and orders filed with the state court and served on the Defendants is attached as Exhibit A.

Respectfully submitted,

ROBERT B. DOUGLAS & ASSOC.

/s/ Robert B. Douglas
Robert B. Douglas, #14492
4949 S. Syracuse St., Suite 400
Denver, Colorado 80237
(303) 721-8180

Attorneys for Defendants
Atlas Company of Lincoln and
Judds Brothers

Defendants' address:

P.O. Box 5344
3835 N. 68th Street
Lincoln, NE 68505
(402) 467-4666

EXHIBIT A

DISTRICT COURT CITY AND COUNTY OF DENVER, COLORADO
CASE NO. 95CV36 div/CtRm ___

SUMMONS

BURLINGTON NORTHERN RAILROAD COMPANY, Plaintiff	ATLAS COMPANY OF LINCOLN and JUDDS BROTHERS CONSTRUCTION COMPANY, INC., Defendant

v.

The People of the State of Colorado
To the Defendant(s) named above:

You are summoned and required to file with the clerk of this court an answer or other response to the attached complaint within twenty (20) days after this summons is served on you in the State of Colorado, or within thirty (30) days after this summons is served on you outside the State of Colorado.

If you fail to file your answer or other response to the complaint in writing within the applicable time period, judgment by default may be entered against you by the court for the relief demanded in the complaint, without any further notice to you.

The following documents are also served with this summons: Complaint

Date: Jan. 4, 1994

KNUDSEN, BERKHEIMER, RICHARDSON & ENDACOTT
By: /s/ Walter J. Downing
Signature of Attorney for Plaintiff or Clerk Deputy Clerk in Court
If issued by attorney, type: Name, address, tel. & illegible

Walter J. Downing, #11257
1401 – 17th Street, Suite 510
Denver, CO 80202
(303) 295-4250

This summons is issued pursuant to Rule 4, CRCP, as amended. A copy of the complaint must be served with this summons.

RETURN OF SERVICE

State of _____

County of _____

I declare under oath that I served this summons and a copy of the complaint in this case on _____ in _____ County _____, on _____ at ____ (Time) at the following location:

[ ] by handing it to a person identified to me as the defendant.

[ ] by leaving it with the defendant who refused service.

[ ] by leaving it with _____ designated to receive service for the defendant.

[ ] I am over the age of 18 years and am not interested in nor a party to this case.

[ ] I attempted to serve the defendant on ____ occasions but have not been able to locate the defendant.

Return to the plaintiff is made on _____ (Date).

Subscribed and sworn to before me this ____ day of _____, 19____ in _____ County, State of _____.

_____
Notary Public*

_____
Date
[ ] Private process server
[ ] Sheriff, _____
County
Service $ _____
Mileage $ _____

_____

_____

* Notary should include address and expiration date of commission.

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO

CIVIL ACTION NO. '95 CV 36 COURTROOM 14

COMPLAINT

(Filed Jan. 5, 1995)

BURLINGTON NORTHERN RAILROAD COMPANY, a Delaware corporation,

Plaintiff,

v.

ATLAS COMPANY OF LINCOLN and JUDDS BROTHERS CONSTRUCTION COMPANY, INC., Nebraska corporations,

Defendants.

Burlington Northern Railroad Company, ("Burlington Northern") by and through its attorneys, Knudsen, Berkheimer, Richardson & Endacott, for its Complaint against Atlas Company of Lincoln ("Atlas") and Judds Brothers Construction Company ("Judds Brothers"), states and alleges as follows:

1. Burlington Northern is a Delaware corporation and an interstate railroad with trackage in the City and County of Denver, among other places.

2. Atlas has merged into Judds Brothers, and Judds Brothers is a Nebraska corporation with a principal place of business at Lincoln, Nebraska.

3. Venue is proper in this county in that the contract upon which this claim is brought was to be and was performed in Denver, Colorado and the negligence of Defendants upon which Burlington Northern bases its claim for contractual indemnification from Atlas and Judds Brothers occurred at Denver, Colorado.

4. On or about January, 1987, Burlington Northern, Judds Brothers and Atlas entered into an Agreement whereby Burlington Northern agreed to provide and furnish to Atlas and Judds certain used railroad ties which were then to be refurbished by Atlas and Judds in Denver, Colorado and then banded, loaded and shipped by railcar to various locations as designated by Burlington Northern. A copy of said agreement is attached hereto and made a part hereof as Exhibit A.

5. Pursuant to the terms of the Agreement, Atlas and Judds Brothers agreed to indemnify and save harmless Burlington Northern from and against any and all losses, claims, demands, suits, causes of action, costs and attorneys' fees, including, but not limited to, injuries or death to employees of Burlington Northern (including claims filed by BN employees under the Federal Employer's Liability Act) caused solely by the negligence of Atlas and Judds Brothers.

6. On October 13, 1988, at or near Centralia, Illinois, Buddy Stanley, a Burlington Northern employee, while unloading certain railroad ties that had been refurbished and banded by Atlas and Judds, was injured when the bands of refurbished railroad ties broke.

7. That the injuries to Mr. Stanley were proximately caused by the negligence of Judds Brothers and Atlas in one or more of the following respects:

(a) the said ties were not tightly bundled together;

(b) the banding on said bundles was not done according to specification; and

(c) the banding material was not of sufficient strength to prevent the bundles of ties from breaking.

8. On October 2, 1991, Mr. Stanley commenced suit against Burlington Northern in the Circuit Court, Third Judicial Circuit, Madison County, Illinois, under the FELA claiming damages for his injuries.

9. On March 13, 1993, Burlington notified Atlas and Judds Brothers by mail of the claim and suit of Mr. Stanley, that the case has a settlement value of $250,000, whether they would pay this amount to settle the suit and to let Burlington Northern know by April 15, 1993 or Burlington Northern would attempt to settle the claim and seek indemnity from them for the settlement amount.

10. Atlas and Judds Brothers responded on March 18, 1993 denying any duty to indemnify Burlington Northern.

11. On April 20, 1993, Burlington Northern caused a Third Party Complaint to be served on Atlas and Judds Brothers claiming indemnity and contribution pursuant to the Agreement.

12. On or about April 21, 1993, Burlington Northern settled with Mr. Stanley for the sum of $250,000 of which

$4,706.84 was withheld to satisfy Railroad Retirement Board liens, and $5,918.26 was withheld to satisfy supplemental sickness benefits.

13. On or about May 10, 1993, Atlas and Judds Brothers filed a special appearance to contest the jurisdiction over them in Illinois. This motion has not been ruled upon to date, and Burlington Northern's Third Party Complaint remains active.

14. Despite demand, Atlas and Judds Brothers has failed and refused to reimburse Burlington Northern for the payments made in settlement of Mr. Stanley's lawsuit as well as medical treatment and wage payments.

15. As a result of Atlas and Judds Brothers' breach of its indemnification agreement in this matter, Burlington Northern has been damaged in the amount of $239,374.20.

WHEREFORE, Burlington Northern prays for judgment against Atlas and Judd's Brothers in an amount to be determined at trial, and for costs, interest, attorneys fees, and such other and further relief as the Court deems just and proper.

Dated this 4th day of January, 1995.

KNUDSEN, BERKHEIMER, RICHARDSON & ENDACOTT

By: /s/ Walter J. Downing
Walter J. Downing #11257
1401 17th Street Suite 510
Denver, CO 80202
(303) 295-4250
Attorney for Plaintiff

Plaintiff's Address:

1401 17th St. #1560
Denver, CO 80202

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

JUDGE KOPF

Civil Action No. 95-N-186

BURLINGTON NORTHERN RAILROAD COMPANY,

Plaintiff(s),

vs.

ATLAS COMPANY OF LINCOLN, a Nebraska corporation and JUDDS BROTHERS CONSTRUCTION COMPANY, a Nebraska corporation,

Defendant(s).

ORDER

(Filed Mar. 21, 1995)

ORDER ENTERED BY MAGISTRATE JUDGE O. EDWARD SCHLATTER

Shawn Schroeder, Secretary

Defendants have filed a motion for change ot venue, [February 24, 1995], asking that the case be transferred to the United States District Court for the District of Nebraska. Plaintiff filed a response stating that it has no objection to the motion.

IT IS THEREFORE ORDERED that venue in this case is transferred from this Court to the U.S. District Court for the District of Nebraska.

DATED at Denver, Colorado on: March 21, 1995

BY THE COURT:

/s/ O. Edward Schlatter
O. Edward Schlatter
United States Magistrate Judge

I certify that I have duly mailed a copy of the foregoing Order to the following:

Walter J. Downing, Esq.
KNUDSEN, BERKHEIMER, RICHARDSON & ENDACOTT
1401 17th Street, Suite 510
Denver, CO 80202

Robert B. Douglas, Esq.
4949 South Syracuse Street
Suite 400
Denver, CO 80237

Dated: March 21, 1995

/s/ Shawn Schroeder
Secretary to Magistrate Judge Schlatter

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

BURLINGTON NORTHERN RAILROAD COMPANY, Plaintiff, v. ATLAS COMPANY OF LINCOLN, a Nebraska corporation, and JUDDS BROTHERS CONSTRUCTION COMPANY, a Nebraska corporation, Defendants.	Case No. 4:CV95-3113 **DEFENDANT'S ANSWER AND AMENDED COUNTERCLAIM** (Filed May 10, 1995)

COMES NOW the Defendants Atlas Company of Lincoln and Judds Brothers Construction Company, by and through their attorneys, and do herein file their Answer and Amended Counterclaim as follows:

1. Admits the allegations set forth in paragraphs 1, 2, 8, 10, 11, and 13 of Plaintiff's Complaint;

2. Denies the allegations set forth in paragraphs 3, 7, and 15 of Plaintiff's Complaint;

3. With regard to the allegations set forth in paragraphs 4 and 5, Defendants admit that in 1987 they entered into a contract with the Plaintiff to refurbish railroad ties and that the contract contained an indemnification provision for injuries occurring on the Colorado

work-site, which were caused solely by Defendants' negligence. The remaining allegations of these paragraphs are denied;

4. With regard to the allegations set forth in paragraph 9, Defendants admit that on March 13, 1993, Burlington notified Atlas and Judds Brothers by mail of the claim and suit of Mr. Stanley, but deny the remaining allegations of this paragraph;

5. Is without knowledge of the truth or falsity of the allegations set forth in paragraphs 6, 12 and 14 of Plaintiff's Complaint, and they are therefore, denied;

6. Denies each and every allegation of Plaintiff's Complaint not specifically answered herein.

ADDITIONAL DEFENSES

7. Plaintiff's losses were caused, in whole or in part, as a result of Plaintiff's negligence or the negligence of Plaintiff's employees;

8. Plaintiff's losses were caused, in whole or in part, as a result of the actions or negligence of third parties over whom Plaintiff had no control;

9. Plaintiff's action is barred by the application of the controlling statute of limitations and the doctrine of laches;

10. Plaintiff failed to mitigate its damages;

11. Plaintiff acted as a volunteer and was negligent in settling the underlying claim for the amount claimed.

WHEREFORE, the Defendants pray that this Court enter an Order dismissing the Plaintiff's Petition and claims with prejudice, at Plaintiff's costs, and further prays for all other relief which is just and equitable in this matter.

AMENDED COUNTERCLAIM

COMES NOW the Defendants, by and through their attorneys, and for their counterclaim against the Plaintiff, do herein state and allege as follows:

1. Defendants are Nebraska corporations with their principal place of business in Nebraska;

2. Plaintiff is a Delaware corporation;

3. The amount in controversy is in excess of $50,000;

4. Prior to January 16, 1990, the Defendant Judds Brothers Construction Company was engaged in litigation with the Burlington Northern Railroad, as a result of certain construction which took place at an intermodel facility located in Omaha, Nebraska, then known as the "Gibson Yard" project. Such litigation was pending before the District Court of Douglas County, Nebraska;

5. On or about January 16, 1990, Judds Brothers Construction Company and the Burlington Northern Railroad entered into an understanding and agreement to settle the litigation and claims arising out of the construction work performed at the Gibson Yard intermodel facility located in Omaha, Nebraska. Pursuant to that settlement agreement, the terms of which were to be "confidential," the Burlington Northern Railroad orally and in writing agreed that thereafter that Judds Brothers

Construction Company would continue to be a supplier of construction services to the Burlington Northern Railroad Company. Such oral and written representations were made on and before January 22, 1990. These oral and written contracts and representations carried with them an implied covenant of good faith and fair dealing and provided for the continuing opportunity of the Defendant Judds Brothers Construction Company to bid on and reasonably obtain work on Plaintiff's construction projects;

6. Following the oral and written agreements of the parties, the Plaintiff solicited the Defendant Judds Brothers Construction Company on certain projects and actually awarded Judds Brothers Construction Company contracts on some of the same. However, after the Plaintiff filed its "Third-Party Complaint" seeking contribution against Judds Brothers Construction Company, in the Circuit Court of the Third Judicial District of Madison County, Illinois, the Plaintiff, on information and belief, intended thereafter not to accept any such bids from Judds Brothers Construction Company, and further, on information and belief, discontinued to consider this Defendant as a possible or actual supplier of construction services to the Plaintiff;

7. During the fall/winter construction season of 1993, the Defendant Judds Brothers Construction Company submitted a bid to the Burlington Northern Railroad with regard to the construction of a bridge located near Grand Island, Nebraska. The approximate amount of such bid was $13.9 million, and Judds Brothers Construction Company believes it was the low bidder on this

project. Judds Brothers Construction Company had previously been requested by the Burlington Northern Railroad Company to submit a bid on this project and in compliance with such request submitted, what Judds Brothers Construction Company presently believes to be the low bid. The Plaintiff refused to grant such contract to the Defendant Judds Brothers Construction Company, and gave no explanation or reason to the Defendant Judds Brothers Construction Company why such bid was not accepted;

8. During approximately the month of May of 1994, the Defendant Judds Brothers Construction Company again submitted a bid to the Plaintiff Burlington Northern Railroad with regard to certain construction at the Hobson yard. Judds Brothers Construction Company was orally informed that after an existing labor contract was settled, the Burlington Northern Railroad would award the contract to Judds Brothers Construction Company. However, the Burlington Northern, through a believed authorized representative, informed Judds Brothers Construction Company thereafter that the Burlington Northern Railroad had changed its mind, and that the contract would not be awarded to Judds Brothers Construction Company. No explanation or rationale for the failure to accept Judds Brothers Construction Company's bid was given;

9. Plaintiff has intentionally precluded Defendants' rights to bid on its construction projects in violation of Plaintiff's express oral and written agreements;

10. As a result of Plaintiff's conduct, Defendants have suffered lost time, and lost profits.

WHEREFORE, Defendants and Counterclaimants seek judgment for their lost time, lost profits, prejudgment interest and attorneys fees as provided by law and for all just and proper relief.

JURY DEMAND

Defendants and Counterclaimants, Judds Brothers Construction Company and Atlas Company of Lincoln seek a trial by jury on all issues so triable in this action.

REQUEST FOR TRIAL IN LINCOLN, NEBRASKA

COMES NOW the Defendants, by and through their attorneys, and do herein request that the trial of this matter be held in Lincoln, Nebraska.

JUDDS BROTHERS
CONSTRUCTION COMPANY
and ATLAS COMPANY OF
LINCOLN, Defendants

By: /s/ William G. Dittrick
of BAIRD, HOLM,
McEACHEN,
PEDERSEN,
HAMANN &
STRASHEIM
1500 Woodmen Tower
Omaha, Nebraska 68102
(402) 344-0500

By: /s/ Dean F. Suing
of KATSKEE,
HENATSCH & SUING
10404 Essex Court, #100
Omaha, Nebraska 68114
(402) 391-1697

Attorneys for Defendants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing Answer and Amended Counterclaim was sent by United States mail, postage prepaid this 10 day of May, 1995, to the following:

Rodney Confer
1000 NBC Center
Lincoln, Nebraska 68508

/s/ William G. Dittrick
William G. Dittrick

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

BURLINGTON NORTHERN RAILROAD COMPANY, Plaintiff, -vs- ATLAS COMPANY OF LINCOLN, a Nebraska Corporation, and JUDDS BROTHERS CONSTRUCTION COMPANY, a Nebraska Corporation, Defendants.	CASE NO. 4:CV95-3113 STIPULATION FOR DISMISSAL, OF PLAINTIFF'S COMPLAINT ONLY WITH PREJUDICE (Filed Nov. 27, 1995)

NOW COME the parties hereto, by and through their attorneys, and hereby Stipulate and agree that plaintiff's Complaint only has been compromised and settled between them and should, therefore, be dismissed, with prejudice; that, the parties further agree that the defendants' Amended Counterclaim has not been settled and compromised, and therefore, same should not be dismissed.

It is further stipulated and agreed between the parties that any signatory party hereto may present the signed original of this Stipulation to the Court to obtain the entry of an Order of Dismissal in conforming herewith.

DATED this 27th day of November, 1995.

BURLINGTON NORTHERN
RAILROAD
COMPANY, Plaintiff,

By /s/ Rodney M. Confer,
Rodney M. Confer
#10753
of KNUDSEN,
BERKHEIMER,
RICHARDSON &
ENDACOTT
1000 NBC Center
Lincoln, Nebraska 68508
(402) 475-7011

Its Attorneys.

ATLAS COMPANY OF
LINCOLN and JUDDS
BROTHERS CONSTRUCTION
COMPANY, Defendants,

By /s/ Dean F. Suing,
Dean F. Suing #15174
Of KATSKEE,
HENATSCH & SUING
10404 Essex Court
Suite #100
Omaha, Nebraska 68114
(402) 391-1697

and

By /s/ William G. Dittrick
William G. Dittrick,
#11024
Of BAIRD, HOLM,
McEACHEN,
PEDERSEN, HAMANN
& STRASHEIM
1500 Woodmen Tower
Omaha, Nebraska 68102
(402) 636-8205

Its Attorneys.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

BURLINGTON NORTHERN RAILROAD COMPANY, Plaintiff, -vs- ATLAS COMPANY OF LINCOLN, a Nebraska Corporation, and JUDDS BROTHERS CONSTRUCTION COMPANY, a Nebraska Corporation, Defendants.	CASE NO. 4:CV95-3113 ORDER OF DISMISSAL (Filed Nov. 29, 1996)

NOW on this 29th day of November, 1995, this matter comes on to be heard by the Court on the Stipulation for Dismissal* of plaintiff's Complaint only, executed by the parties by virtue of which the Court is advised that the plaintiff's cause of action has been settled and compromised between them and requesting that the Court enter an Order herein dismissing the Complaint only, with prejudice; that the Court further finds that the Amended Counterclaim has not been settled and that further proceedings should be had with regard to the Amended Counterclaim in accordance with the Order Setting Schedule for Progression of Case entered by the Court on June 6, 1995.

IT IS ORDERED, ADJUDGED AND DECREED that plaintiff's Complaint only be, and the same hereby is,

dismissed, with prejudice, and that further proceedings be had with regard to the Amended Counterclaim of defendants in accordance with the Order Setting Schedule for Progression of Case.

11/29/95
BY THE COURT:
/s/ Richard G. Kopf
U.S. DISTRICT JUDGE
Richard G. Kopf

Prepared and Submitted by:

Dean F. Suing, #15174
of KATSKEE, HENATSCH & SUING
10404 Essex Court
Suite #100
Omaha, Nebraska 68114
(402) 391-1697

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

BURLINGTON NORTHERN RAILROAD COMPANY, Plaintiff, vs. ATLAS COMPANY OF LINCOLN, a Nebraska Corporation, and JUDDS -BROTHERS CONSTRUCTION COMPANY, a Nebraska Corporation, Defendants.	Case No. 4:CV95-3113 **REPLY TO COUNTERCLAIM**

Burlington Northern Railroad Company replies to Defendant's Amended Counterclaim herein as follows:

1. Admits the allegations of paragraphs 1-4 of the Amended Counterclaim.

2. Admits the allegations that the parties entered into an agreement to settle the litigation and claims arising out of the construction work performed at Gibson Yard on January 16, 1990, and that the terms of the settlement agreement were to be confidential, as alleged in paragraph 5 of the Amended Counterclaim; Burlington Northern specifically denies that it made oral agreements as alleged in paragraph 5, and further alleges that any written agreements speak for themselves, but do not include the terms alleged by defendant; the remaining allegations of paragraph 5 of the Amended Counterclaim are denied.

3. The allegations of paragraph 6, to the effect that there were oral agreements of the parties, are denied; Burlington Northern admits, however, that it has solicited defendant to submit offers and has entered into contracts with Judds Bros. Construction Company since 1990; Burlington Northern further alleges, on information and belief, that other corporations which are subsidiaries of, associated with, under common ownership with, or under control of defendants have also been solicited for offers and have entered into contracts with Burlington Northern Railroad Company since 1990. Each and every other allegation of paragraph 6 of the Amended Counterclaim not specifically admitted herein is denied.

4. Burlington Northern admits the allegation in paragraph 7 of the Amended Counterclaim that Judds Bros. Construction Company submitted an offer in the fall or winter of 1993 to construct a bridge located near Grand Island, Nebraska, but alleges that the offer submitted by Judds Bros. Construction Company and all other offers on the project greatly exceeded the estimated budget for the project and were rejected; Burlington Northern revised the project to come within its budget and again invited defendant to submit an offer to construct the revised project; defendant made an offer to construct the revised project which greatly exceeded the low bid and Burlington Northern rejected defendant's offer; Burlington Northern denies each and every other allegation in paragraph 7 not specifically admitted herein.

5. In reply to paragraph 8 of the Amended Counterclaim, Burlington Northern alleges that in June of 1994, Defendant and another construction company made offers to construct a freight pit fueling project; although

Defendant's offer was slightly less than the other contractor's, after receiving the offers Burlington Northern engineering representatives met with both contractors and determined that the other contractor's offer was preferable from the standpoint of meeting specifications, meeting contract standards and meeting the time schedule, and would involve the least amount of difficulty for Burlington Northern Railroad Company and less risk of extra orders; accordingly Burlington Northern accepted the other contractor's offer to perform the work and rejected defendant's offer; each and every other allegation of paragraph 8 of the Amended Counterclaim not specifically admitted herein is denied.

6. The allegations of paragraphs 9 and 10 of the Amended Counterclaim are denied.

7. Burlington Northern denies each and every other allegation of the Amended Counterclaim not specifically admitted herein.

FIRST DEFENSE

8. Defendant's Amended Counterclaim fails to state any cause of action upon which relief may be granted.

SECOND DEFENSE

9. Any oral agreement alleged by Defendant was not to be performed within one year from the making thereof, and therefore violated the statute of frauds, *Neb. Rev. Stat.* §36-202.

THIRD DEFENSE

10. Burlington Northern denies any oral or written contract providing that Judds Bros. Construction Company would continue to be a supplier of construction services to Burlington Northern Railroad Company for a definite or indefinite period of time in the future.

FOURTH DEFENSE

11. Burlington Northern denies any oral or written contract imposing a duty on its part to accept defendant's offers to construct projects upon which it submitted bids.

FIFTH DEFENSE

12. Any cause of action alleged by defendants herein is barred by the applicable statute of limitations.

WHEREFORE, plaintiff Burlington Northern Railroad Company prays for judgment herein, that defendant's Amended Counterclaim be dismissed, at defendants' costs, and for such further relief as the Court deems appropriate in the premises.

BURLINGTON NORTHERN
RAILROAD COMPANY,
Defendant

By: KNUDSEN, BERKHEIMER,
RICHARDSON & ENDACOTT
1000 NBC Center
Lincoln, Nebraska 68508
(402) 475-7011

By: /s/ Rodney M. Confer
Rodney M. Confer – #10753
One of Said Attorneys

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he caused a true and correct copy of the foregoing Reply to Counterclaim to be served on William A. Dittrick, 1500 Woodmen Tower, Omaha, NE 68102, by First Class United States mail, sufficient postage prepaid on this 23rd day of April, 1996.

/s/ Rodney M. Confer
Rodney M. Confer

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

BURLINGTON NORTHERN RAILROAD COMPANY, Plaintiff, v. ATLAS COMPANY OF LINCOLN, a Nebraska Corporation, and JUDDS BROTHERS CONSTRUCTION COMPANY, a Nebraska Corporation, Defendants.	Case No. 4:CV95-3113 **REPLY TO PLAINTIFF'S "REPLY TO COUNTERCLAIM" (ANSWER)** (Filed May 3, 1996)

COMES NOW Judds Brothers Construction Company, Inc. (Judds), by and through their attorneys, and for its "Reply" to the "Reply to Counterclaim" filed by the Plaintiff, herein does herein state and allege as follows:

1. Judds does herein deny each and every allegation of new matter contained within the Plaintiff's "Reply to Counterclaim" except those allegations hereinafter admitted and those allegations constituting admissions against the interest of the Burlington Northern Railroad Company.

WHEREFORE, Judds reinstates herein as if plead [sic] herein, the prayer of its Counterclaim, and further prays for all other relief which is just and proper.

JUDDS BROTHERS CONSTRUCTION COMPANY, INC. and ATLAS COMPANY OF LINCOLN, Defendants

By: /s/ William G. Dittrick
William G. Dittrick

of BAIRD, HOLM, McEACHEN, PEDERSEN, HAMANN & STRASHEIM
1500 Woodmen Tower
Omaha, Nebraska 68102
(402) 344-0500

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing Reply to Plaintiff's "Reply to Counterclaim" was sent by United States mail, postage prepaid this 3 day of May, 1996, to the following:

Rodney Confer
1000 NBC Center
Lincoln, Nebraska 68508

/s/ William G. Dittrick
William G. Dittrick

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

BURLINGTON NORTHERN RAILROAD COMPANY, **Plaintiff,** **v.** **ATLAS COMPANY OF LINCOLN, a Nebraska Corporation, and JUDDS BROTHERS CONSTRUCTION COMPANY, a Nebraska Corporation,** **Defendants.**	**Case No. 4:CV95-3113** **ORDER OF FINAL PRE-TRIAL CONFERENCE** (Filed 12/11/97)

A final pretrial conference was held on the 28th day of June, 1995. Appearing for the parties as counsel were:

For the Defendant: William G. Dittrick (#11024)
Kelly R. Dahl (#19273)
For: BAIRD, HOLM,
McEACHEN, PEDERSEN,
HAMANN & STRASHEIM
1500 Woodmen Tower
Omaha, NE 68102-2068
Telephone: (402) 636-8223

For the Plaintiff: Rodney M. Confer (#10753)
For: KNUDSEN,
BERKHERIMER,
RICHARDSON,
ENDACOTT & ROUTH
1000 NBC Center
Lincoln, NE 68508-1474
402-475-7011

A. *EXHIBITS IN EVIDENCE.* The only objections made to the exhibits are those shown on the attached list.

B. *FOUNDATION FOR EXHIBITS.* The only objections made to the exhibits are those shown on the attached list. *See* Plaintiff's and Defendant's List of Exhibits attached hereto.

C. *EXHIBITS CONTESTED ON ALL GROUNDS.* The admission of the following exhibits is contested on all grounds: *See* Plaintiff's List of Exhibits and Defendant's List of Exhibits attached hereto.

Caution: The mere listing of an exhibit on an exhibit list by a party does not mean it can be offered into evidence by the adverse party without all necessary evidentiary prerequisites being met. ** The exhibits listed may be amended (by addition) by notice to opposing counsel at least fifteen days prior to trial.

D. *UNCONTROVERTED FACTS AND ISSUES.* The parties have agreed that the following may be accepted as established facts for purposes of this case only:

The Parties agree and stipulate that the Plaintiff Burlington northern Railroad Company n/k/a Burlington Northern and Santa Fe Railway Company ("BNRR") is a corporation practicing business in the State of Nebraska. The Defendant Judds Brothers Construction Company ("Judds") is a corporation whose principal place of business is in the State of Nebraska.

The Plaintiff and Defendant have agreed with regard to the below listed exhibits that the same shall be admitted as such at the trial of this action.

E. *CONTROVERTED AND UNRESOLVED ISSUES.* The issues remaining to be determined and unresolved matters for the court's attention are:

Plaintiff BNRR's Statement of Controverted and Unresolved Issues

1. Whether the Settlement Agreement of January 16, 1990 or the letter of 1-22-90 or any oral promise gives Judds a contractual right to bid on Burlington Northern Railroad construction projects.

2. Whether the Settlement Agreement of January 1, 1990 or the letter of 1-22-90 or any oral promise gives Judds Bros. a contractual right to contract with BNRR.

3. Whether BNRR has breached its Settlement Agreement of January 16, 1990.

Defendant Judds; Statement of Additional Controverted and Unresolved Issues

1. Whether, as part of the settlement of an existing lawsuit between the parties, an oral and/or written contract or promise was made by the BNRR to Judds on or about January 16, 1990 wherein the BNRR agreed that it would continue thereafter to notify and allow Judds to bid on (and be awarded such bids if their bids were low) BNRR construction projects involving grading, utilities, concrete work, and bridge construction.

2a. Whether, during the fall of 1993, the BNRR breached this contract by failing to accept Judds Brothers' low bid with regard to a

construction project known as the "Grand Island, Nebraska Grade Separation" (AFE 93-0656) and further in failing to negotiate with Judds for a lower bid.

Whether further, in the fall of 1993, the BNRR breached its contract with Judds by giving a competitor (Lawrence Construction Co.) information regarding Judds prior bid, which allowed Lawrence to submit a lower bid than Judds Brothers during the second round of bidding.

2b. What damages Judds Brothers suffered as a result of this breach by BNRR of their contract and promises made.

3a. Whether during the spring of 1994, the BNRR again breached its contract with Judds Brothers by requesting Judds Brothers to bid on a project known as the Lincoln, Nebraska Fueling Upgrade (AFE 94-1174), and after Judds Brothers had submitted the low bid, had been orally told they had the contract and had been recommended for the bid by the engineers, the BNRR thereafter refused to contract with Judds Brothers' for the project, and instead awarded the bid to a competitor of Judds Brothers.

3b. What damages Judds Brothers has suffered as a result of the BNRR's above-mentioned breach of contract.

4a. Whether the BNRR, after June of 1994, generally breached its contract and promises with Judds by refusing to notify Judds of all the construction projects available for bidding.

4b. What damages Judds has suffered as a result of such breach.

F. *WITNESS:* All witnesses, including rebuttal witnesses, whom PLAINTIFF expects to call to testify, except those who may be called for impeachment purposes only, are the witnesses listed by Defendant and:

WITNESSES

Larry Woodley
Ron Schapp
Richard Lawrence
Parker Adelman
R.J. Stremcha
Robert Boileau

Plaintiff will probably use the following depositions:

John Judds
Ray Judds
Kevin Steele

All witnesses, including rebuttal witnesses, whom DEFENDANT JUDDS expects to call to testify, except those who may be called for impeachment purposes only, are the witnesses listed by the Plaintiff and:

WITNESSES

Raymond Judds
John R. Judds
Kevin Steele
William Walters
Patrick Barclay
Trent Hudak
David Purdy
G. G. Albin
Jack Moy
William Glavin
James Eggen
Duane Curbow

Jerry Helms
Bud Shipman
Dana Johnson
Lawrence Krug (Hooker Bros.)
Charles Leichner (HDR)
William Raleigh (HDR)
John Bosshart
** Defendant Judds will probably use the following depositions:

William Glavin
Patrick Barclay
G.G. Albin
Jack Moy
Trent Hudak

It is understood by both parties that they may supplement this list and the expert witness list at any time within the next 45 days, and except upon a showing of good cause, no other witness whose name and address does not appear herein or on a supplemental list hereto (filed within 45 days hereof) shall be permitted to testify over objection for any purpose except impeachment. A witness appearing on any party's witness list may be called by the other party.

G. *EXPERT WITNESSES' QUALIFICATIONS.* Experts to be called and their qualifications are:

FOR THE PLAINTIFF:

Patrick Barclay
Trent Hudak
David Purdy
G.G. Albin
Jack Moy
Jerry Helms

FOR THE DEFENDANT:

John Judds: See biographical attached.

Kevin Steele: See biographical attached.

H. *DEPOSITIONS AND OTHER DISCOVERY DOCUMENTS.*

1. All depositions, answers to written interrogatories, and requests for admissions or portions thereof which the Plaintiff presently plans to offer in evidence by the **PLAINTIFF** as part of the Plaintiff's case-in-chief are:

Depositions:

Raymond Judds
John Judds
Kevin Steele

Plaintiff shall at the time of trial present a copy of such depositions, which are to be used, and such depositions shall be highlighted in green to show the portions of the same offered by the Plaintiff. Copies of the same shall have been presented to opposing counsel at least 10 calendar days prior to trial.

***Objections* (other than as to form and foundation made at the deposition) by Defendant are:**

Noted in yellow in the margins of the highlighted copies of the deposition transcripts to be used at trial.

Answers to Written Interrogatories: Defendant Judds' Answers to Plaintiff's Interrogatories.

Objections by Defendant are: Those noted in the documents.

Responses to Requests for Admissions:

Objections by Defendant are:

2. All depositions, answers to written interrogatories, and requests for admissions or portions thereof which are expected to be offered in evidence by the **DEFENDANT** Judds as part of the Defendant's case-in-chief are:

Depositions:

1. William Glavin
   Patrick Barclay
   G.G. Albin
   Jack Moy
   Trent Hudak

2. Remaining portions of the depositions identified by the Plaintiff.

Defendant Judds shall at the time of trial present a copy of all depositions, which are to be used, and such depositions shall be highlighted in yellow to show the portions of the same offered by the Defendant. Copies of the same shall have been presented to opposing counsel at least 10 calendar days prior to trial.

Objections (other than as to form and foundation made at the deposition) by Plaintiff are to be noted in green in the margins of the highlighted copies of the deposition transcripts to be used at trial.

STIPULATION: SUBJECT TO COURT APPROVAL, IT IS AGREED THAT THE PARTIES MAY SUPPLEMENT THEIR DEPOSITION DESIGNATIONS BY ADDING FURTHER DESIGNATIONS FROM TAKEN DEPOSITIONS IN THE EVENT OF UNAVAILABILITY AT TIME OF TRIAL

OF ANY WITNESS NOW EXPECTED TO BE CALLED AS A LIVE WITNESS. FURTHER, THE PARTIES, WITHIN THE NEXT 45 DAYS, MAY TAKE THE DEPOSITIONS OF ADDITIONAL WITNESSES).

Objections by Plaintiff are: Objections (other than as to form and foundation made at the deposition) are noted in the margins of highlighted copies of the depositions.

Answers to Written Interrogatories:

1. Plaintiff's Answers to Interrogatories

Objections by Plaintiff are: Those noted in the documents

Responses to Requests for Admissions:

None.

Objections by Plaintiff are:

I. *VOIR DIRE.* Counsel have reviewed Fed. R. Civ. P. 47(a) and NELR 47.1. The parties request that the Court conduct a preliminary examination of prospective jurors, with counsel for both parties asking follow-up questions.

J. *NUMBER OF JURORS.* The parties suggest that this matter be tried to a jury composed of 12 members.

K. *VERDICT.* The parties will not stipulate a less than unanimous verdict.

L. *DELIVERY OF BRIEF AND INSTRUCTIONS.*

1. Trial briefs shall be delivered to the trial court judge at least three (3) working days before the first day of trial.

2. Proposed jury instructions shall be delivered to the trial court judge on or before the first day of trial.

M. *LENGTH OF TRIAL.* Counsel estimate the length of trial will consume not less than four (4) days, not more than six (6) days, and probably about five (5) or six (6) days. The parties request a date certain for the trial to begin.

N. *TRIAL DATE.* Trial is set at the court's call in Feb. 1998 as soon thereafter as the case may be called.

DATED this 11 day of December, 1997.

By: /s/ William G. Dittrick
William G. Dittrick (#11024)

Of BAIRD, HOLM, McEACHEN, PEDERSEN, HAMANN & STRASHEIM
1500 Woodmen Tower
Omaha, NE 68012-2068
Telephone: (402) 636-8223

Attorneys for Defendant

BY THE COURT:

/s/ David L. Piester
David L. Piester
United States Magistrate Judge

BY: /s/ Rodney M. Confer
Rodney M. Confer

Of: KNUDSEN, BERKHEIMER, RICHARDSON, ENDACOTT & ROUTH
1000 NBC Center
Lincoln, NE 68508-1404
(402) 475-7011

Attorneys for Plaintiff

BEST AVAILABLE COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

BURLINGTON NORTHERN RAILROAD COMPANY,

Plaintiff,

vs.

ATLAS COMPANY OF LINCOLN, a Nebraska corporation, and JUDDS BROTHERS CONSTRUCTION COMPANY, a Nebraska corporation,

Defendant.

4 :CV95-3113

LIST OF EXHIBITS

Deputy _____

Reporter _____

Trial Dates: _____

Exhibit Number		Description	Witness	Off'd	Objec.*	Rec'd	Not Rec'd	Date
Plaintiff	Defendant Judds							
	1	5/26/96 B.N. Contract (B2 West Refueling Facility)				X		
	2							
	3	Financial Statements of Judds = year ended 1997			FC	[redacted]		
	4	Financial Statements of Judds = year ended 1994			"			
	5	Financial Statements of Judds = year ended 1995			"			
	6	Financial Statements of Judds = year ended 1996			"			
	7				"			
	8	Nebr. newspaper article (11/11/93) (0737)			H			
	9	Nebr. newspaper article			H			
	10	First Judds' Bid on Gr. Island job				X		

Exhibit Number		Description	Witness	Off'd	Objec.*	Rec'd	Not Rec'd	Date
Plaintiff	Defendant Judds							
	11.	Second Judds' Bid on Gr. Island job				X		
	12.	9/26/94 Field memo (Bill Lawrence)			RHC			
	13.	11/8/94 HDR fax			"			
	14.	3/20/95 HDR letter to Barclay			"			
	15.	Judds' 2nd Bid working file (Gr. Is.)			"			
	16.	Judds' 1st Bid working file (Gr. Is.)			"			
	17.	Overhead Cost Exhibits			ALL			
	18.	5/3/91 HDR letter (01-5)			"			
	19.	BN-HDR contract (013-22)			RHC			
	20.	DeLeuw Estimates (051-52)			ALL			
	21.	ROW memos & additional costs (0474-0483)			"			
	22.	Press Release of BN (062-063)			"			
	23.	7/1/94 Schapp Memo to Gerald Albin (0501-0511) (extra ROW work)			RC			
	24.	8/24/94 Rick Lawrence letters to Pat Barclay = compensation for added ROW work (0512-0523)			ALL			
	25.	8/9/94 BN letter to Leichner (00528)			"			
	26.	AFE - track work analysis (064-77)			RHC			
	27.	HDR letter to Barclay (7/28/94) (reason for extra cost)			"			
	28.	10/10/94 Lawrence letter to Barclay (0548) (Lawrence asked for redesign)			"			

* Key to Objection Abbreviations

Materiality.....M
Relevancy.....R
Hearsay.....H
Foundation.....F
Other.....O

Exhibit Number		Description	Witness	Off'd	Objec.*	Rec'd	Not Rec'd	Date
Plaintiff	Defendant Judds							
	29.	10/24/94 Barclay to Lawrence and attachment (0549-0551)			ALL			
	30.	Barclay letter to Raleigh of HDR (4/22/95) (0552-0554) (settle for $50,000)			RHC			
	31.	3/20/95 Raleigh letter to Barclay with summary of added cost problems (0569-0575)			"			
	32.	5/25/94 Lawrence letter to BN (demolish houses and trees) (0588-0589)			ALL			
	33.	Feasibility Study (0264-0304)			"			
	34.	AFE of Gr. Is. Project (0305-0327) (allocation of budget items)			RC			
	35.	Feasibility figure (0332-0336)			ALL			
	36.	HDR Design Changes (0649-0701)			ALL			
	37.	Memo of BN to Gustofson (0421) -- total cost is 22.9 million			RFC			
	38.	Costs estimates (0422-0424)			ALL			
	39.	0425 = Extra Order #16 (12/15/95)			RC			
	40.	0426-430 Extra Order #19 estimate			ALL			
	41.	Post bid addendum 3/31/94 (0702-0712)			ROF			
	42.	Meeting with Lawrence & Ames 6/4/94 (0716)			ALL			
	43.	BNSF meeting 7/14/94 (0718-0721)			"			
	44.	AFE 93-0656 12/31/94 (0724)			"			

* Key to Objection Abbreviations

Materiality.....M
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Exhibit Number		Description	Witness	Off'd	Objec.*	Rec'd	Not Rec'd	Date
Plaintiff	Defendant Judds							
	45.	HDR letter retaining walls 10/4/93 (0725-0726)			ALL			
	46.	HDR memo 11/8/93 to Lawrence not allowing main line out of service (0729)			"			
	47.	Lawrence letter to HDR 11/5/93 constructability of utilities (0730-0731)			"			
	48.	HDR letter to BNSF (0735-0736)			"			
	49.	BNRR (0737)			"			
	50.	Bid Summary 1/9/93 with comments (0769-0777)			"			
	51.	Bid Summary (Jan.) (0787-0802)				X		
	52.	JBCC Cost Savings Proposal 11/15/93 (0819)			RC			
	53	Sept. 1. 1992 letter (0846)			ALL			
	54	Dec. 3. 1993 reject letter (0850)			"			
	55	Lawrence Contract (0855-0873)				X		
	56	Change Order #2 (JN001395)			HRC			
	57	C.O. #1 (JN001400-01)			"			
	58	Neosho Invoice - Inspection/Consulting (JN001403-04)			"			
	59	8/15/94 Mtg. Minutes (JN001417)			All			
	60	Project Schedule (JN001419)			"			
	61	Cost Estimates (JN001425-1433)			"			
	62	Neosho Contract (JN001437-1446)				X		
	63	7/21/94 letter (JN001450)			All			

* Key to Objection Abbreviations

Materiality.....M
Relevancy.....R
Hearsay.....H
Foundation.....F
Other.....O

Exhibit Number		Description	Witness	Off'd	Objec.*	Rec'd	Not Rec'd	Date
Plaintiff	Defendant Judds							
	64.	7/19/94 letter (JN001457)			All			
	65.	Neosho/Judds Price Revisions /Mtg. (JN001467-1503)			"			
	66.	* Interoffice Memo (JN001603)			"			
	67.	Letter (cover letter for Contract - Neosho) (JN001873)			"			
	68.	Letter - Frequency of Extras (JN001880)			"			
	69.	Letter - Midam (JN001900)			"			
	70.	Frt Pit Mtg Report (JN001687-90)			"			
	71.	Frt Pit Bid Evaluation (JN001943)			"			
	72.	→ Havelock Yard-Locker Room/ Lunchroom (JN001957-1959)			"			
	73.	BN Exhibits (Freigh Pit)			"			
	74.	Gibson Yard Complaint				X		
	75.	BN lawsuit and settlement pleadings			all			
	76.	Buddy Stanley petition				X		
	77.	BNRR letter to Judds (May '93)			all			
	78.	Judds response to Stanley			"			
	79.	BNRR Complaint filed in Colo.				X		
	80.	BNRR Answer to Judds' Interrogatories			RO			
	81.	Jan. 16, 1990 letter of Glavin				X		
	82.	Dismissal with Prejudice (1990)				X		
	83.	Dismissal with Prejudice (1990) (HWS)				X		
	84.	Letter of Wicka to Dittrick (Jan. 1990)			all			

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Materiality.....M
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Hearsay.....H
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Other.....O

Exhibit Number		Description	Witness	Off'd	Objec.*	Rec'd	Not Rec'd	Date
Plaintiff	Defendant Judds							
	85.	Letter Agreement 1/22/96				X		
	86.	Settlement Presentation brochure			all			
	87.	NEOSHO's bid on Lincoln Freight Pit				X		
	88.	Final "As Built" drawings on Freight Pit			all			
	89.	Final Pay Request on Freight Pit			all			
	90.	Judds 1st bid on Freight Pit				X		
	91.	6/8/94 Purdy letter to Trent Hudak (and attachment)				X		
	92.	List of 40 projects			all			
	93.	Bid Comparison Sheets (Gr. Is.)				X		
	94.	Feasibility Alternative Map (01996)			REF			
	95.	List of Judds' bid on BN job			FO			
	96.	List of Judds' jobs (all)			FO			
	97.	List of Judd BN jobs and money received			FO			
	98.	Judds' Damage Summary (Gr. Is.)			FO			
	99.	Judds' Damage Summary (Lincoln Fueling)			"			
	100.							
	101.	Judds' Project Summary 1994			all			
	102.	Judds' Project Summary 1995			"			
	103.	Judds' Project Summary 1996			"			
	104.	Utilities; Building; Miscellaneous; Railroad; and Bridges Job Profit Summaries and Backup (1994-1997)			"			

* Key to Objection Abbreviations

Materiality.....M
Relevancy.....R
Hearsay.....H
Foundation.....F
Other.....O

Exhibit Number		Description	Witness	Off'd	Objec.*	Rec'd	Not Rec'd	Date
Plaintiff	Defendant Judds							
	105.	Railroad Job Summaries and Backup (1986-1997)			all			
	106.	B2 West Revenues, Costs, and Summary						
	107.							
	108.							
	109.							
	110.							
	111.							
	112.							
	113.							
	114.							
	115.							

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* Key to Objection Abbreviations

Materiality.....M
Relevancy.....R
Hearsay.....H
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Other.....O

Exhibit Number		Description	Witness	Off'd	Objec.*	Rec'd	Not Rec'd	Date
Plaintiff	Defendant Judds							
201		Moy Ltr. to NEOSHO, 10/10/93				X		
202		February, 1994 Bid Summary				X		
203		2/15/94 Bid of Judds Brothers				X		
204		12/3/93 Ltr. to Contractors				X		
205		Lawrence Construction Ltr. to Helm, 11/12/93				X		
206		Gantry Crane Contract, 7/17/92				X		
207		Wheel Racks and Stops Contract, 9/8/92				X		
208		Truck Shop Concrete Bid, 9/20/94				X		
209		Gurnsey Fueling Facility Bid Summary				X		
210		Judds Brothers Construction Co./Appolo Steel Co. Projects				X		
211		Judds' Ltr. to Bosshart, 10/3/91				X		
212		Judds' Ltr. to Pentas, 9/12/91				X		
213		Judds/ Ltr. to Bosshart, 8/19/91				X		
214		Tie Rehabilitation Contract, 4/7/92				X		
215		Fab Shop Contract Documents			All			
216		Release Agreement, 11/14/95				X		
217		Dismissal of Complaint, BN v. Atlas and Judds				X		
218		B2 Fueling Contract, 5/28/96				X		
219		Grand Island Grade Separation Project Drawings				X		
220		Lincoln Freight Pit Drawings				X		
221		List of Judds Brothers Construction Project Bid to Burlington Northern				X		

* Key to Objection Abbreviations

Materiality.....M
Relevancy.....R
Hearsay.....H
Foundation.....F
Other.....O

Exhibit Number		Description	Witness	Off'd	Objec.*	Rec'd	Not Rec'd	Date
Plaintiff	Defendant Judds							
222		Judds Brothers Construction Company Cash Receipts from Burlington Northern			All			
223		Judds Brothers Construction Company Jobs Completed			All			
224		Manhole Contract				X		
225		Wheel Shop Contract				X		
226		Gantry Crane Contract, 5/17/93				X		
227		Canapy Proposal				X		
228		William Glavin Ltr., 1/22/90				X		

245:46

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* Key to Objection Abbreviations

Materiality.....M
Relevancy.....R
Hearsay.....H
Foundation.....F
Other.....O

John R. Judds
2000 West Branched Oak Road
Raymond, Nebraska 68428

Education: Lincoln Northeast High School

Bachelor of Science Degree,
Construction Management – 1980
University of Nebraska – Lincoln

Work Experience:

1981-1985
Atlas Company of Lincoln, Lincoln, Nebraska
- Estimator/Project Manager

1985-Current
Atlas Utility Company, Tulsa, Oklahoma
Owner/President
- Utility/Concrete Contractor performing work in Oklahoma

1985-Current
Judds Bros. Construction Co.

Vice President 1985-1989
- Handling estimating/project management for utility and concrete construction projects.

President 1989-Current
- Responsible for all aspects of the on going construction business
- Representing 100 million dollars of construction volume
- Estimating/Project Manager of all types of construction projects (General, Utility, Railroad, Concrete)

Major Projects:

- Minuteman II missile dismantlement/Whiteman AFB, Missouri, U.S. Army Corps of Engineers
- Packages 22B, 60, 72, 73, 75, 80 Utility and Concrete Construction/Whiteman AFB, Missouri Representing approximately 10 million in construction value
- NDOR Bridges in Sutherland, NE, Atkinson, NE, Nebraska City, NE, Crab Orchard, NE, Gretna, NE, Elmwood, NE
- Numerous Utility Projects for Tulsa Metropolitan Utility Authority

Affiliations: Nebraska Chapter AGC Board of Directors

Kevin S. Steele
1106 North 66th
Lincoln, Nebraska 68505

Education: Bachelor of Science Degree, Construction Management – 1984
University of Nebraska – Lincoln

Work Experience:

1982-1985
Atlas Company of Lincoln
Estimator/Project Manager

1985-Present
Judds Brothers Construction Company, Lincoln, NE

Estimator/Project Manager 1985/1992

Vice President 1993-Present

Major Projects:

- Rennick Yard Intermodal Facility; Burlington Northern/Denver, Co
- Tie Rehabilitation; Burlington Northern/Denver, Co
- Utility Extension City Campus; University of Nebraska/Lincoln, Ne
- Lincoln Water Plant Expansion; LWS/Lincoln, Ne
- Lincoln Water System 5mg Reservoir/Lincoln, NE
- Lincoln Water System Pump Station/Lincoln, NE
- Hastings Utilities CEM Tower/Hastings, NE
- Ag Processing Site Utilities/Hastings, Ne
- 36" Sanitary Sewer/Grand Island, NE
- NDOR Cass County Bridge/Cass County, NE
- NDOR Lincoln West Bridge Repair/Lincoln, NE

Affiliations: American Railway Engineering Association (AREA)
American Concrete Institute (ACI)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JUDDS BROTHERS CONSTRUCTION CO., Plaintiff, vs. BURLINGTON NORTHERN RAILROAD COMPANY, Defendant.	Case Number 4:95CV3113 **COURT MINUTES CIVIL JURY TRIAL** (Filed Mar. 31, 1998) Date: March 30, 1998 Deputy: Cathy J. Scigo Reporter: Rogene S. Schroder Trial Commenced: 10:00 a.m. Trial Concluded: 4:35 p.m.

Trial before Judge Lyle E. Strom, United States District Court, at ~~Omaha~~ Lincoln, Nebraska.

APPEARANCES:

For Plaintiff: William Dittrick; John J. Jolley
For Defendant: Rodney M. Confer; Corey L. Stull

PROCEEDINGS:

[X] Civil trial began.

[X] Jury empaneled (File list of jurors).

[X] Opening statements.

[X] Evidence by [X] Plaintiff [X] Defendant.

[] Plaintiff rests. [] Defendant rests.

[] Closing arguments.

[X] Trial not concluded – continued to March 31, 1998 at 9:00 a.m.

[] Jury returned at without verdict. IT IS ORDERED: to separate and to return and resume deliberations on.

[] Civil trial ended.

IT IS ORDERED:

(X) Oral motion by defendant to sequester witnesses is granted; no written order forthcoming.

CLERK'S USE ONLY:

(X) Terminate Magistrate referral.

() Number of Trial Days with Evidence – Enter Number of Days.

JURY PANEL RECORD

DISTRICT OF NEBRASKA
MARCH 30, 1998
FILED 4:95CV3113

BURLINGTON NORTHERN RAILROAD COMPANY v. ATLAS COMPANY OF LINCOLN, et al.

Rodney M. Confer — William J. Dittrick

Judge Lyle E. Strom

NO.	NAME	CHALLENGED BY P	D	C
1	#16 Wardyn Geraldine			
2	~~#226 Day, Donald L.~~		3	
3	~~#159 Dorcey, Francis J.~~	3		
4	#204 Fredrickson, George			
5	~~#10 Heyen, Joyce M.~~		1	
6	#12 Van-Meter, Shirley L.			
7	~~#88 Booker, Traci L.~~	1		
8	#185 Hoggins, Jefrey M.			
9	#281 Jons, Kent S.			
10	#64 Morrison, Elle M.			
11	#249 McCerter, Lucinda			
12	#175 Hermann, Carolina			
13	#245 Kinney, Kenneth			
14	~~#265 Porter, Sheila M.~~	2		
15	#110 Fonnerman, Robert			
16	#30 Vallabhbhai, Michelle			
17	#109 Benda, Joann L.			
18	~~#26 Boyd, Dennis A.~~		2	

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JUDDS BROTHERS CONSTRUCTION CO., Plaintiff, vs. BURLINGTON NORTHERN RAILROAD COMPANY, Defendant.	Case Number 4:95CV3113 **COURT MINUTES CIVIL JURY TRIAL** (Filed Mar. 31, 1998) Date: March 31, 1998 Deputy: Cathy J. Scigo Reporter: Rogene S. Schroder Trial Commenced: 9:00 a.m. Trial Concluded: 4:35 p.m.

Trial before Judge Lyle E. Strom, United States District Court, at ~~Omaha~~ Lincoln, Nebraska.

APPEARANCES:

For Plaintiff: William Dittrick; John J. Jolley
For Defendant: Rodney M. Confer; Corey L. Stull

PROCEEDINGS:

[X] Civil trial resumed.

[] Jury empaneled (File list of jurors).

[] Opening statements.

[X] Evidence by [X] Plaintiff [X] Defendant.

[] Plaintiff rests. [] Defendant rests.

[] Closing arguments.

[X] Trial not concluded – continued to April 1, 1998 at 9:00 a.m.

[] Jury returned at without verdict. IT IS ORDERED: to separate and to return and resume deliberations on ___.

[] Civil trial ended.

IT IS ORDERED:

CLERK'S USE ONLY:

() Terminate Magistrate referral.

() Number of Trial Days with Evidence – Enter Number of Days.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JUDDS BROTHERS CONSTRUCTION CO., Plaintiff, vs. BURLINGTON NORTHERN RAILROAD COMPANY, Defendant.	Case Number 4:95CV3113
	COURT MINUTES CIVIL JURY TRIAL
	(Filed Apr. 1, 1998)
	Date: April 1, 1998 Deputy: Cathy J. Scigo Reporter: Rogene S. Schroder Trial Commenced: 9:00 a.m. Trial Concluded: 4:40 p.m.

Trial before Judge Lyle E. Strom, United States District Court, at Lincoln, Nebraska.

APPEARANCES:

For Plaintiff: William Dittrick; John J. Jolley
For Defendant: Rodney M. Confer; Corey L. Stull

PROCEEDINGS:

[X] Civil trial resumed.

[] Jury empaneled (File list of jurors).

[] Opening statements.

[X] Evidence by [X] Plaintiff [] Defendant.

[] Plaintiff rests. [] Defendant rests.

[] Closing arguments.

[X] Trial not concluded – continued to April 2, 1998 at 9:00 a.m.

[] Jury returned at without verdict. IT IS ORDERED: to separate and to return and resume deliberations on ___.

[] Civil trial ended.

IT IS ORDERED:

CLERK'S USE ONLY:

() Terminate Magistrate referral.

() Number of Trial Days with Evidence – Enter Number of Days.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JUDDS BROTHERS CONSTRUCTION CO., Plaintiff, vs. BURLINGTON NORTHERN RAILROAD COMPANY, Defendant.	Case Number 4:95CV3113 **COURT MINUTES CIVIL JURY TRIAL** (Filed Apr. 2, 1998) Date: April 2, 1998 Deputy: Cathy J. Scigo Reporter: Rogene S. Schroder Trial Commenced: 9:00 a.m. Trial Concluded: 4:30 p.m.

Trial before Judge Lyle E. Strom, United States District Court, at Lincoln, Nebraska.

APPEARANCES:

For Plaintiff: William Dittrick; John J. Jolley
For Defendant: Rodney M. Confer; Corey L. Stull

PROCEEDINGS:

[X] Civil trial resumed.

[] Jury empaneled (File list of jurors).

[] Opening statements.

[X] Evidence by [] Plaintiff [X] Defendant.

[X] Plaintiff rests. [] Defendant rests.

[] Closing arguments.

[X] Trial not concluded – continued to April 3, 1998 at 9:00 a.m.

[] Jury returned at without verdict. IT IS ORDERED: to separate and to return and resume deliberations on.

[] Civil trial ended.

IT IS ORDERED:

[X] Oral motion by defendant for a directed verdict or in the alternative, judgment as a matter of law is overruled; no written order forthcoming.

CLERK'S USE ONLY:

() Terminate Magistrate referral.

() Number of Trial Days with Evidence – Enter Number of Days.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JUDDS BROTHERS CONSTRUCTION CO., Plaintiff, vs. BURLINGTON NORTHERN RAILROAD COMPANY, Defendant.	Case Number 4:95CV3113 **COURT MINUTES CIVIL JURY TRIAL** (Filed Apr. 6, 1998) Date: April 3, 1998 Deputy: Cathy J. Scigo Reporter: Rogene S. Schroder Trial Commenced: 9:00 a.m. Trial Concluded: 5:40 p.m.

Trial before Judge Lyle E. Strom, United States District Court, at Lincoln, Nebraska.

APPEARANCES:

For Plaintiff: William Dittrick; John J. Jolley
For Defendant: Rodney M. Confer; Corey L. Stull

PROCEEDINGS:

[X] Civil trial resumed.

[] Jury empaneled (File list of jurors).

[] Opening statements.

[X] Evidence by [] Plaintiff [X] Defendant.

[] Plaintiff rests. [X] Defendant rests.

[] Closing arguments.

[X] Trial not concluded – continued to April 6, 1998 at 11:00 a.m.

[] Jury returned at without verdict. IT IS ORDERED: to separate and to return and resume deliberations on.

[] Civil trial ended.

IT IS ORDERED:

[X] Oral motion by defendant for a directed verdict or in the alternative, judgment as a matter of law is overruled; no written order forthcoming.

CLERK'S USE ONLY:

() Terminate Magistrate referral.

() Number of Trial Days with Evidence – Enter Number of Days.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JUDDS BROTHERS CONSTRUCTION CO., Plaintiff, vs. BURLINGTON NORTHERN RAILROAD COMPANY, Defendant.	Case Number 4:95CV3113 **COURT MINUTES CIVIL JURY TRIAL** (Filed Apr. 7, 1998) Date: April 6, 1998 Deputy: Cathy J. Scigo Reporter: Rogene S. Schroder Trial Commenced: 10:55 a.m. Trial Concluded: 5:15 p.m.

Trial before Judge Lyle E. Strom, United States District Court, at Lincoln, Nebraska.

APPEARANCES:

For Plaintiff: William Dittrick; John J. Jolley
For Defendant: Rodney M. Confer; Corey L. Stull

PROCEEDINGS:

[X] Civil trial resumed.

[] Jury empaneled (File list of jurors).

[] Opening statements.

[X] Evidence by [] Plaintiff [X] Defendant.

[] Plaintiff rests. [X] Defendant rests.

[X] Closing arguments.

[X] Instruction conference.

[] Trial not concluded – continued to ___.

[X] Jury received case at 4:35 p.m.

[] Jury resumed deliberations on ___.

[X] Jury returned at 5:15 p.m. without verdict. IT IS ORDERED: to separate and to return and resume deliberations on April 7, 1998 at 9:00 a.m.

[] Verdict Rec'd at for:

[] Plaintiff
[] Defendant

[X] Civil trial ended.

IT IS ORDERED:

[] Clerk file Verdict and enter Judgment.

[] Clerk file Verdict, but withhold entry of Judgment until further order.

CLERK'S USE ONLY:

(X) Number of Trial Days with Evidence – 6 Days.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

JUDDS BROS. CONSTRUCTION COMPANY, Plaintiff, v. BURLINGTON NORTHERN RAILROAD COMPANY, Defendant.	)	4:CV95-3113 COURT'S CHARGE TO THE JURY (Filed April 7, 1998)

INSTRUCTION NO. 1

Now that you have heard the evidence and the arguments of counsel, it is my duty to inform you of the legal principles and considerations you are to use in arriving at a proper verdict.

In accordance with the oath which each of you took when you were selected as jurors to try this case, it is your duty to determine the disputed issues of fact in this case from the evidence produced and seek thereby to reach a verdict which shall speak the truth of the case and thereby do justice between the parties hereto, uninfluenced by sympathy, favor, affection or prejudice for or against any party. It is your duty to receive and accept as correct the law as given you in this charge, and you are not privileged to entertain an opinion as to the law or what the law should be which conflicts in any respect with the law as stated in this charge. However, I have not attempted to embody all the law applicable to this case in

any one of the instructions contained in this charge, and therefore, you must consider the charge in its entirety, giving due weight to each instruction, and construing each instruction in the light of, and in harmony with, the other instructions, and so apply the principles set forth to all of the evidence received during the trial.

INSTRUCTION NO. 2

At the outset, I urge you to make every effort to reach an agreement in your deliberations. Inconclusive trials are not desirable. A common understanding among competent and intelligent people ought to be possible.

However, this observation must not be construed by any juror as a suggestion of the abandonment of an opinion held understandably and earnestly, just for the sake of agreement. The Court must never coerce agreements by jurors. It is appropriate to suggest that if you should find yourselves in apparent disagreement, each of you should carefully reexamine your opinions before assuming a position of dissent.

I should give you one preliminary word of caution. It is seldom wise or beneficial for a juror to make an emphatic expression of his or her opinion of the case, or to announce a determination to stand for a certain verdict, immediately upon entering the jury room at the beginning of deliberations. The reason for this is obvious.

We are all human, and it is difficult to recede from a position once it has been firmly and definitely stated.

INSTRUCTION NO. 3

Corporations are entitled to the same fair trial at your hands as a private individual. All persons stand equal before the law and are to be dealt with as equals in a court of justice.

A corporation can act only through its employees or agents. A corporation is bound by the acts or omissions of its employee or agent when such acts or omissions occur within the scope of the duties of such employee or agent.

You are instructed that William Glavin, as Burlington's chief engineer, had the authority to act on behalf of and to bind Burlington with regard to any contractual or settlement agreement entered into with Judds on January 16, 1990.

INSTRUCTION NO. 4

During the trial I have ruled on objections to certain evidence. You must not concern yourselves with the reason for such rulings since they are controlled by rules of law.

You must not speculate or form or act upon any opinion as to how a witness might have testified in answer to questions which I have rejected during the trial, or upon any subject matter to which I have forbidden inquiry.

In coming to any conclusion in this case, you must be governed by the evidence before you and by the evidence alone.

You have no right to indulge in speculation, conjecture or inference not supported by the evidence.

The evidence from which you are to find the facts consists of the following: (1) the testimony of the witnesses; (2) documents and other things received as exhibits; and (3) any facts that have been stipulated – that is, formally agreed to by the parties.

The following things are not evidence: (1) statements comments, questions and arguments by lawyers for the parties; (2) objections to questions; (3) any testimony I have stricken from the record or told you to disregard; and (4) anything you may have seen or heard about this case outside the courtroom.

INSTRUCTION NO. 5

While you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the light of common experience. In other

words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts which have been established by the testimony and evidence in the case.

You have heard the terms "direct evidence" and "circumstantial evidence." You are instructed that you should not be concerned with those terms since the law makes no distinction between the weight to be given to direct and circumstantial evidence.

INSTRUCTION NO. 6

You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves.

In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of what a witness said, or only part of it, or none of it.

In determining the weight to be given to the testimony of the witnesses, you should take into consideration their interest in the result of the suit, if any appears, their conduct and demeanor while testifying, their apparent fairness or bias, their relationship to the parties, if any appears, their opportunities for seeing or knowing and remembering the things about which they testified, the reasonableness or unreasonableness of the testimony given by them, any previous statement or conduct of the

witness that is consistent or inconsistent with the testimony of the witness at this trial, and all of the evidence, facts, and circumstances proved which tend to corroborate or contradict such evidence, if any appear. You are not bound to take the testimony of any witness as true, and should not do so if you are satisfied from all the facts and circumstances proved at the trial that such witness is mistaken in the matter testified to, or that for any other reason appearing in the evidence, the testimony is untrue or unreliable.

The fact that one side may have used a greater number of witnesses or presented a greater quantity of evidence should not affect your decision. Rather, you should determine which witness or witnesses, and which evidence appears accurate and trustworthy. It is the weight of the evidence that counts – not the number of witnesses.

The testimony of a single witness which produces in your minds belief in the likelihood of truth is sufficient for proof of any fact, and would justify a verdict in accordance with such testimony, even though a number of witnesses may have testified to the contrary if, after consideration of all of the evidence in the case, you hold greater belief in the accuracy and reliability of the one witness.

INSTRUCTION NO. 7

During the trial in this case, certain testimony has been presented to you by way of deposition, consisting of sworn recorded answers to questions asked of the witness by attorneys for the parties in the case. Such testimony is entitled to the same consideration and is to be judged as to credibility, and weighed, and otherwise considered by the jury in the same way as if the witness had been present, and had testified from the witness stand.

INSTRUCTION NO. 8

You have heard testimony from persons described as experts. Persons who, by education and experience, have become expert in some field may state their opinions on matters in that field and may also state the reasons for their opinion.

Expert testimony should be considered just like any other testimony. You may accept or reject it, and give it as much weight as you think it deserves, considering the witness' education and experience, the reasons given for the opinion and all the other evidence in the case.

INSTRUCTION NO. 9

Certain charts and summaries have been shown to you in order to help explain the facts disclosed by the books, records, and other documents which are in evidence in the case. However, such charts or summaries are not in and of themselves evidence or proof of any facts. If such charts or summaries do not correctly reflect facts or figures shown by the evidence in the case, you should disregard them.

INSTRUCTION NO. 10

The parties to this action are Judds Brothers Construction Company and Burlington Northern Railroad Company. Throughout these instructions, Judds Brother Construction Company shall be referred to as the plaintiff or as Judds, and Burlington Northern Railroad Company shall be referred to as the defendant or as Burlington.

INSTRUCTION NO. 11

In determining whether a party to this action has sustained its burden of proof, you are not limited to the evidence introduced by that party. Any party to the case

is entitled to the benefit of any evidence tending to establish its contention, even though such evidence comes from witnesses presented by the other party.

INSTRUCTION NO. 12

It is appropriate at this time to define certain terms which may appear from time to time in this charge.

By a "preponderance of the evidence" is meant the greater weight of credible evidence; that is not determined by the greater number of witnesses testifying in relation to the facts and circumstances, but that amount of evidence which on the whole, when fully, fairly and impartially considered, makes the stronger impression on your mind and is more convincing as to its truth when weighed against the evidence in opposition thereto. If the evidence is equally balanced, a preponderance is not established.

A "proximate cause" is a cause that produces a result in a natural and continuous sequence, and without which the result would not have occurred. This does not mean that the law recognizes only one proximate cause of an injury or damage consisting of only one factor or thing, or of the conduct of only one person. On the contrary, many factors, or the conduct of two or more persons, may operate at the same time, either independently or together, to cause injury or damage; and in such a case, each may be a proximate cause. Where the independent acts or failures to act of more than one person combine to

proximately cause the same injury, each such act or failure to act is a proximate cause, and each such person may be held responsible for the entire injury.

INSTRUCTION NO. 13

I shall now explain the claims made by the parties which are pertinent to your deliberations.

In this case Judds claim that Burlington breached part of the Agreement which Judds and Burlington entered into in January of 1990 to settle litigation arising from a construction project Judds was performing for Burlington at the Gibson Yards in Omaha, Nebraska.

Judds claims that in addition to Exhibit 81, the parties agreed that Burlington would reinstate Judds as a supplier of construction services to Burlington, and as such a supplier, Judds would be given the opportunity to bid on all Burlington construction projects Judds could feasibly perform and that Judds would be awarded the contract on those construction projects if it was the low bidder.

Judds claims Burlington breached the Agreement by precluding Judds from bidding on Burlington construction projects Judds was capable of performing and by not awarding Judds the contract for construction of the Grand Island grade separation project and the Hobson Yards freight pit project.

Judds claim [sic] that Burlington breached its duty of good faith and fair dealing by not taking steps to insure that Judds' contractual rights under the Settlement Agreement were not injured or denied.

Judds claims that it was damaged as a proximate result of Burlington's breach, and it seeks judgment against Burlington for these damages.

Burlington admits that it entered into the Settlement Agreement with Judds as set forth in Exhibit 81, and that pursuant to paragraph D of Exhibit 81 it prepared and sent to plaintiff a letter dated January 22, 1990, Exhibit 85. Burlington also admits that Judds submitted bids for the Grand Island grade separation project and the Hobson Yard freight pit project and that Judds was the lowest bidder for the Hobson Yards freight pit project.

Burlington denies that it agreed that it would reinstate Judds as a supplier of construction services to Burlington for any definite or indefinite period of time. Burlington denies that Judds would be given the opportunity to bid on all Burlington construction projects Judds could feasibly perform, and also denies that it is required to award contracts to Judds on any construction projects.

Burlington claims it did not award Judds the contract for the Grand Island grade separation project because the Judds' bid exceeded the budget established for the project, and that, after the project was redesigned, the Judds' bid was not the low bid. Burlington also claims that the contract for the Hobson Yards freight pit project was awarded to another contractor whose bid exceeded Judds' bid because Burlington engineers believed the

other contractor would do a better job of meeting the plans and specifications on time.

You must understand, members of the jury, that the foregoing summary constitutes only a brief analysis of the claims made respectively by the parties in this case and must not be taken or considered by you as any evidence in this case.

INSTRUCTION NO. 14

When Burlington invites bids on a construction project contract and receives bids in response to that invitation, Burlington has the right as a matter of law to reject any or all of the bids for any reason unless Burlington is otherwise contractually bound to accept a certain bid.

INSTRUCTION NO. 15

Before the plaintiff can recover against the defendant, the plaintiff must prove, by a preponderance of the evidence, each of the following elements:

1. That Agreement to settle the Gibson Yards litigation included each of the following terms:

   (a) that Judds would continue to be a supplier of construction services to Burlington;

(b) that Judds would be given the opportunity to bid on all Burlington construction projects Judds could feasibly perform; and

(c) that Burlington would award Judds the contract on construction projects on which Judds was the low bidder;

2. That the defendant breached the Agreement in one or more of the following ways:

(a) by not awarding Judds the construction contract for the Grand Island grade separation project, or

(b) by not awarding Judds the construction contract for the Hobson Yards freight pit project;

3. That this breach was a proximate cause of some actual damage to the plaintiff; and

4. The nature and extent of such actual damage.

If the plaintiff has *not* proved each of these four elements by a preponderance of the evidence, then your verdict must be for the defendant.

If the plaintiff *has* proved each of these four elements by a preponderance of the evidence, then your verdict must be for the plaintiff.

INSTRUCTION NO. 16

Every contract contains a duty of good faith and fair dealing. This duty requires the parties to a contract to

perform in a manner that furthers the agreed common purpose of the contract. Neither party may intentionally injure or deny the rights of the other party to receive the benefits that party is entitled to under the contract.

INSTRUCTION NO. 17

You may consider the provisions of Exhibit 81 and Exhibit 85 in deciding what the Agreement and intentions of the parties were on January 16, 1990 and, where an ambiguity exists in the terms of either of these exhibits, you should construe the agreement against the preparer, in this case Burlington.

INSTRUCTION NO. 18

If you find in favor of Judds on its breach of contract claim, then you must determine the amount of plaintiff's actual damages. "Actual damages" are damages sustained as a result of real loss or injury. Monetary loss is not the only form of actual damages.

In this case, you may find that plaintiff suffered actual damages if you find that plaintiff suffered any loss, detriment or harm, including the reasonable value of the profits it has lost, proximately caused by defendant's failure to award Judds the construction contract on either

or both of the Grand Island grade separation project or the Hobson Yards freight pit project.

In computing actual damages, you may not rely on speculation, guess work or conjecture, however, mathematical certainty or unrealistic exactitude is not required. Additionally, you must not award any damages for Burlington's alleged failure to give Judds the opportunity to bid on certain projects or by way of punishment or through sympathy.

INSTRUCTION NO. 19

In the trial of this case and in this charge, I have in no way attempted to express my opinion as to who should prevail upon the issues submitted to you. You must not construe any statement, action, or ruling on my part in the trial of this case as an indication of any opinion on my part respecting the proper course of your verdict. During the course of a trial, I occasionally ask questions of a witness in order to bring out facts not fully covered in the testimony. Do not assume that I hold any opinion on the matters to which the questions related.

So regardless of what I may have chosen to say, I must admonish you that you are the sole judges of the facts, and your verdict must respond to your own conclusions from the evidence.

INSTRUCTION NO. 20

Upon your retirement to the jury room, first select one of your number to be foreperson to preside over your deliberations and who will sign the verdict form. You will then begin your study and deliberations of the case.

In arriving at your verdict, I admonish you that it must be unanimous. Short of unanimity, you cannot consider that you have reached any verdict.

If it becomes necessary during your deliberations to communicate with the Court, dial 5227 on the telephone to signal this office. Then your foreperson may deliver a note to the Judge. Bear in mind you are not to reveal to the Court or to anyone else how the jury stands, numerically or otherwise, until you have reached a unanimous verdict.

Upon arriving at your verdict and completion of the verdict form by the foreperson, you will have concluded your task and you will notify the Judge.

As the Judge presiding over the trial, I shall be available throughout the remainder of the day and until your verdict is returned, and I shall receive it promptly upon its return.

If you do not arrive at your verdict during the present court day, you will continue deliberations until you do, with allowance of time for meals and with an intermission between 5 p.m. today and 9 a.m. tomorrow morning. During the time allotted for meals and night's rest, you will be permitted to separate, but you should return promptly at the time set for continuation of your deliberations. During the periods of your separation, you should

keep in mind the admonitions of the Court concerning your conduct while separated.

A verdict form has been prepared and will be taken with you when you retire for your deliberations. This form will be adequate for the expression of any verdict you may properly agree upon. Only your foreperson will date and sign the verdict.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA

JUDDS BROS. CONSTRUCTION COMPANY, Plaintiff, v. BURLINGTON NORTHERN RAILROAD COMPANY, Defendant.	4:CV95-3113 VERDICT FORM (Filed Apr. 7, 1998)

1) Did Judds prove by a preponderance of the evidence the terms of the Agreement as set forth in element 1 of Instruction No. 15?

X YES _ NO

If your answer to question number one is "NO," then your deliberations are complete and your foreperson should sign and date this verdict form. If your answer to question number one is "YES," then proceed to answer the following questions.

2) Did Judds prove by a preponderance of the evidence that Burlington breached the Agreement by not awarding Judds the construction contract for the Grand Island grade separation project?

X YES _ NO

If your answer to question number two is "NO," then proceed directly to question number four. If your answer to question number two is "YES," then proceed to question number three.

3) What amount, if any, of actual damages did Judds sustain as a proximate result of Burlington's failure to award Judds the construction contract for the Grand Island grade separation project?

$704521.05

4) Did Judds prove by a preponderance of the evidence that Burlington breached the Agreement by not awarding Judds the construction contract for the Hobson Yards freight pit project?

X YES _ NO

If your answer to question number four is "NO," then your deliberations are complete and your foreperson should sign and date this verdict form. If your answer to question number one is "YES," then proceed to question number five.

5) What amount, if any, of actual damages did Judds sustain as a proximate result of Burlington's failure to award Judds the construction contract for the Hobson Yards freight pit project?

$86711.00

DATED this 7th day of April, 1998.

/s/ Lucinda D. McCarter
FOREPERSON

The jury has reached a verdict.

/s/ Lucinda D. McCarter

Foreperson

April 7, 1998

1558

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JUDDS BROTHERS CONSTRUCTION COMPANY, Plaintiff, vs. BURLINGTON NORTHERN RAILROAD COMPANY, Defendant.	Case Number 4:95CV3113 **COURT MINUTES CIVIL JURY TRIAL** Date: April 7, 1998 Deputy: Cathy J. Scigo Reporter: Trial Commenced: 9:00 a.m. Trial Concluded: 4:30 p.m.

Trial before Judge Lyle E. Strom, United States District Court, at Lincoln, Nebraska.

APPEARANCES: For Plaintiff: William Dittrick; John J. Jolley
For Defendant: Rodney Confer; Corey Stull

PROCEEDINGS:

[] Civil trial resumed.

[] Jury empaneled (File list of jurors).

[] Opening statements.

[] Evidence by [] Plaintiff [] Defendant.

[] Plaintiff rests. [] Defendant rests.

[] Closing arguments.

[] Instruction conference.

[] Trial not concluded – continued to.

[] Jury received case at

[X] Jury Resumed deliberations on April 7, 1998 at 9:00 a.m.

[] Jury returned at without verdict. IT IS ORDERED: to separate and to return and resume deliberations on

[X] Verdict Rec'd at 4:00 p.m. for:

[X] Plaintiff
[ ] Defendant

[] Civil trial ended.

IT IS ORDERED:

[ ] Clerk file Verdict and enter Judgment.

[X] Clerk file Verdict, but withhold entry of Judgment until further order.

CLERK'S USE ONLY:

() Number of Trial Days with Evidence –

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

JUDDS BROTHERS CONSTRUCTION, COMPANY,	)	
Plaintiff,	)	4:95CV3113
v.	)	JUDGMENT
BURLINGTON NORTHERN RAILROAD, COMPANY,	)	(Filed Apr. 10, 1998)
Defendant.	)	

This action came before the Court for trial by jury. The issues have been tried and the jury has rendered its verdict.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of the Plaintiff, Judds Brothers Construction Company and against Defendant, Burlington Northern Railroad Company, in the amount of $791,232.05 together with the Plaintiff's costs herein.

Dated this 10th day of April, 1998.

GARY D. MCFARLAND
Clerk of Court

By /s/ Cathy J. Scigo
Cathy J. Scigo
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

BURLINGTON NORTHERN RAILROAD COMPANY, Plaintiff, vs. ATLAS COMPANY OF LINCOLN, a Nebraska Corporation, and JUDDS BROTHERS CONSTRUCTION COMPANY, a Nebraska Corporation, Defendants.	Case No. 4:CV95-3113 **BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY'S MOTION FOR JUDGMENT AS A MATTER OF LAW OR IN THE ALTERNATIVE FOR A NEW TRIAL** (Filed Apr. 15, 1998)

Pursuant to Rule 50(b) of the Federal Rules of Civil Procedure, Defendant Burlington Northern and Santa Fe Railway Company ("BNSF") renews its request for judgment as a matter of law made at the close of Plaintiff's case and close of all the evidence for the reason that there is no legally sufficient evidentiary basis for a reasonable jury to find for Plaintiff. Specifically, Defendant respectfully shows the Court the following:

(a) There was no legally sufficient evidence which would allow a jury to conclude that the parties' settlement agreement of January 16, 1990, included a term that Burlington Northern was required to allow Plaintiff to bid on future contracts;

(b) There was no legally sufficient evidence that the parties' settlement agreement of

January 16, 1990, and the letter of January 22, 1990, included a term that required Burlington Northern to allow Plaintiff to Bid on future contracts;

(c) There was no legally sufficient evidence that the parties' settlement agreement of January 16, 1990 or the letter of January 22, 1990, included a term that Burlington Northern was required to award any contract to Plaintiff on which it was the low bidder;

(d) There was no legally sufficient evidence that the parties' settlement agreement of January 16, 1990, included an oral agreement that Burlington Northern and Santa Fe was required to award Plaintiff any contract upon which it was the low bidder;

(e) There was no legally sufficient evidence that BNSF breached the parties' settlement agreement by not awarding Plaintiff the contract for the Grand Island grade separation project;

(f) There was no legally sufficient evidence that BNSF breached the parties' settlement agreement by not awarding Plaintiff the contract for the Lincoln freight pit refueling project;

(g) There was no legally sufficient evidence of lost profits sustained by the Plaintiff as a proximate result of not being awarded the Grand Island grade separation project contract; and

(h) There was no sufficient proof that Plaintiff sustained lost profits as a proximate result

of not being awarded the contract for construction of the Lincoln freight pit project.

Wherefore, Burlington Northern and Santa Fe Railway Company prays for entry of judgment in its favor herein, and for dismissal of Plaintiff's counterclaim at Plaintiff's costs, and for such other and further relief as the Court deems appropriate in the premises.

In the alternative, pursuant to Rule 59 of the Federal Rules of Civil Procedure, Defendant Burlington Northern and Santa Fe Railway Company moves for a new trial in this action on the following grounds:

(a) That the verdict is not sustained by sufficient evidence;

(b) That the verdict is contrary to law;

(c) Errors of law which occurred at the trial and were duly excepted to by the undersigned;

(d) Misconduct of the jury which deprived Defendant of a fair trial;

(e) The Court erred in giving Instruction No. 15 to the jury, which was tendered in part by the adverse party, and in part given by the Court on its own motion; and

(f) The Court erred in giving Instruction No. 17 tendered by the adverse party.

A Memorandum Brief in support of this Motion has been filed with the Court.

Dated this 15th day of April, 1998.

BURLINGTON NORTHERN
RAILROAD COMPANY,
Defendant

By: KNUDSEN, BERKHEIMER,
RICHARDSON & ENDACOTT
1000 NBC Center
1248 "O" Street
Lincoln, Nebraska 68508
(402) 475-7011

By: /s/ Rodney M. Confer – #10753
One of Said Attorneys

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he caused a true and correct copy of the foregoing **Burlington Northern and Santa Fe Railroad Company's Motion for Judgment as a Matter of Law or in the Alternative for a New Trial** to be served on William G. Dittrick and Michael D. Daley, 1500 Woodmen Tower, Omaha, NE 68102, by First Class United States mail, sufficient postage prepaid on this 15th day of April, 1998.

/s/ Rodney M. Confer
Rodney M. Confer

IN THE UNITED STATES DISTRICT COURT
OF THE DISTRICT OF NEBRASKA

BURLINGTON NORTHERN RAILROAD COMPANY, Plaintiff, vs. ATLAS COMPANY OF LINCOLN, a Nebraska Corporation, and JUDDS BROTHERS CONSTRUCTION COMPANY, a Nebraska Corporation, Defendants.	4:CV95-3113 **NOTICE OF APPEAL** (Filed Jun. 19, 1998)

Notice is hereby given that Judds Brothers Construction Company, Defendant in the above-named case, hereby appeals to the United States Court of Appeals for the Eighth Circuit from the final judgment of the United States District Court for the District of Nebraska entered in this action on the 3rd day of June, 1998, wherein the court granted Plaintiff's motion for judgment as a matter of law and set aside the jury's verdict in the amount of $791,232.05 in favor of the Defendant.

Dated this 19 day of June, 1998.

JUDDS BROTHERS
CONSTRUCTION COMPANY,
Defendant-Appellant

By: /s/ William G. Dittrick
William G. Dittrick (#11024)
John J. Jolley, Jr. (#20726)

Of BAIRD, HOLM, MCEACHEN, PEDERSEN, HAMANN & STRASHEIM
1500 Woodmen Tower
Omaha, Nebraska 68102
(402) 344-0500

Its Attorneys

CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the foregoing Notice of Appeal was served by regular United States mail, postage prepaid, on the 19 day of June, 1998 upon the following:

Rodney Confer, Esq.
Knudsen, Berkheimer, Richardson, Endacott & Routh
1000 NBC Center
Lincoln, Nebraska 68508-1474

/s/ Willaim G. Dittrick
William G. Dittrick

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

AMENDED ORDER

No. 98-2678NEL

Burlington Northern Railroad Company, a Delaware corporation,	*	
Appellee,	*	Order Denying Petition for Rehearing and for Rehearing En Banc
v.	*	
Atlas Company, of Lincoln, Nebraska corporation;	*	
Defendant,	*	
Judds Brothers Construction Company, Nebraska corporation,	*	
Appellant.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. Judge C. Arlen Beam took no part in the consideration of the petition.

(5128-010199)

August 26, 1999

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

BURLINGTON NORTHERN RAILROAD COMPANY, Plaintiff, vs. ATLAS COMPANY OF LINCOLN, a Nebraska Corporation, and JUDDS BROTHERS CONSTRUCTION COMPANY, a Nebraska Corporation, Defendants.	4:CV95-3113 **APPELLANT'S ORDER OF TRANSCRIPT PURSUANT TO FED. R. APP. P. 10(b)** (Filed Jun. 19, 1998)

TO: ROGENE SCHRODER, Matheson & Taulborg, 7602 Pacific Street, Omaha, Nebraska 68114, (402) 397-9669

Pursuant to FED. R. APP. P. 11(b), you are hereby requested to prepare a transcript of all parts of the trial of the above-referenced proceeding not already on file. Please supply counsel for Defendant-Appellant a copy of the same.

Cost of preparation of the transcript and for the copy shall be paid upon submission of a billing statement by Baird, Holm, McEachen, Pedersen, Hamann & Strasheim, counsel for Defendant-Appellant.

DATED THIS 19 day of June, 1998.

JUDDS BROTHERS CONSTRUCTION COMPANY, Defendant-Appellant

By: /s/ William G. Dittrick
William G. Dittrick (#11024)
John J. Jolley, Jr. (#20726)

of BAIRD, HOLM, McEACHEN, PEDERSEN, HAMANN & STRASHEIM
1500 Woodmen Tower
Omaha, Nebraska 68102
(402) 344-0500

Its Attorneys

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above Appellant's Order of Transcript Pursuant to FED. R. APP. P. 10(b) was served by regular United States Mail, postage prepaid, on this 19 day of June, 1998, to the following:

Rogene Schroder
Matheson & Taulborg
7602 Pacific Street
Omaha, Nebraska 68114

Rodney Confer, Esq.
Knudsen, Berkheimer, Endacott & Routh
1000 NBC Center
Lincoln, Nebraska 68508-1474

/s/ William G. Dittrick

IN THE UNITED STATES DISTRICT COURT
OF THE DISTRICT OF NEBRASKA

BURLINGTON NORTHERN RAILROAD COMPANY, Plaintiff, vs. ATLAS COMPANY OF LINCOLN, a Nebraska Corporation, and JUDDS BROTHERS CONSTRUCTION COMPANY, a Nebraska Corporation, Defendants.	4:CV95-3113 **PROOF OF SERVICE** (Filed Jun. 19, 1998)

The undersigned hereby certifies that on June 19, 1998, a true and correct copy of Appellant's Form A with attachment (Partial List of Issues On Appeal), an original of Appellee's Form B, and a copy of the Notice of Appeal filed herein was sent by regular United States mail, first class postage prepaid, to the following:

Rodney Confer, Esq.
Knudsen, Berkheimer, Richardson,
Endacott & Routh
1000 NBC Center
Lincoln, Nebraska 68508-1474

Dated this 19 day of June, 1998.

JUDDS BROTHERS CONSTRUCTION COMPANY, Defendant-Appellant

By: /s/ William G. Dittrick
William G. Dittrick (#11024)
John J. Jolley, Jr. (#20726)

of BAIRD, HOLM, McEACHEN, PEDERSEN, HAMANN & STRASHEIM
1500 Woodmen Tower
Omaha, Nebraska 68102
(402) 344-0500

Its Attorneys

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

BURLINGTON NORTHERN RAILROAD COMPANY, Plaintiff, vs. ATLAS COMPANY OF LINCOLN, a Nebraska Corporation, and JUDDS BROTHERS CONSTRUCTION COMPANY, a Nebraska Corporation, Defendants.	4:CV95-3113 **APPELLANT'S DESIGNATION OF EXHIBITS PURSUANT TO 8TH CIR. R. APP. P. 30A(b)(5)** (Filed Jun. 19, 1998)

Defendant-Appellant, Judds Brothers Construction Company, pursuant to 8TH CIR. R. APP. P. 30A(b)(5), hereby designates as a part of the record on appeal all exhibits accepted into evidence at the trial of this matter.

The District Court Clerk is requested to retain such designated exhibits until such time the Clerk of the United States Court of Appeals for the Eighth Circuit requests transmittal of the same.

DATED THIS 19 day of June, 1998.

JUDDS BROTHERS CONSTRUCTION COMPANY, Defendant-Appellant

By: /s/ William G. Dittrick
William G. Dittrick (#11024)
John J. Jolley, Jr. (#20726)

of BAIRD, HOLM, McEACHEN, PEDERSEN, HAMANN & STRASHEIM
1500 Woodmen Tower
Omaha, Nebraska 68102
(402) 344-0500

Its Attorneys

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above Appellant's Designation of Exhibits Pursuant to 8TH FED. R. APP. P. 30A(b) (5) was served by regular United States Mail, postage prepaid, on this 19 day of June, 1998, to the following:

Rodney Confer, Esq.
Knudsen, Berkheimer, Richardson,
Endacott & Routh
1000 NBC Center
Lincoln, Nebraska 68508-1474

/s/ William G. Dittrick

EXHIBIT 81

[LOGO] BURLINGTON NORTHERN RAILROAD

[Name And Address Omitted In Printing]

January 16, 1990

Mr. Ray Judds
Judds Brothers Construction Company
3835 North 68th Street
Lincoln, NE 68507

Dear Mr. Judds:

Burlington Northern vs Judds Brothers Construction Company
Judds Brothers Construction Company vs Burlington Northern

This will confirm an understanding you and I reached today to settle all litigation and claims arising out of the construction of the Gibson Yard Intermodal facility at Omaha, Nebraska, It is agreed as follows:

A) Burlington Northern will satisfy all outstanding claims for material furnished for this job. Consolidated Mixing will be paid in the full amount outstanding (approximately $87,000.00).

B) Burlington Northern will pay Judds Brothers the sum of $250,000.00.

C) All claims are released and all litigation dismissed in any way arising out of the project without further cost or expense to either party. The lawyers will take the action necessary to accomplish this.

D) I will write you a letter indicating that the litigation here resulted from a misunderstanding between the parties and that the controversy has been resolved to the mutual satisfaction of Burlington Northern and Judds Brothers.

E) Representatives of both parties will keep the settlement terms strictly confidential.

If the above terms are acceptable to Judds Brothers please indicate by signing on the line below and returning one copy to me.

Yours very truly,

/s/ William E. Glavin
William E. Glavin

ACCEPTED: /s/ Ray Judds
Ray Judds

EXHIBIT 84

[LOGO] BURLINGTON NORTHERN RAILROAD

LAW DEPARTMENT

[Address Omitted In Printing]

TELEFAXED

January 11, 1990

William G. Dittrick
Baird, Holm, McEachen, Pedersen,
Hamann & Strasheim
1500 Woodmen Tower
Omaha, Nebraska 68102-2069

Re: Burlington Northern v. Judds Bros. Construction Co.;

Dear Mr. Dittrick:

I have your letter of January 10, 1990, with respect to this litigation. While I appreciate your kind words with respect to my initiative in attempting to reach a settlement in this case, I have come to the conclusion that both you and I stand in the way of progress. You ask me, for instance, what projects are out there that would be suitable for Judds Bros., and I do not know other than the continuation of the tie rehabilitation program beyond 1992. In turn, each time I bring up settlement to you, it takes at least a week for you to respond and I judge that as because of a need for you to contact your client.

Therefore, I propose that Ray Judds and Bill Glavin meet, one-on-one with no lawyers or anyone else present, to see if they are able to reach some understanding. Please communicate this proposal to your client *immediately* so

that if it is acceptable, the meeting can be held promptly. We continue to expend funds for legal services and litigation support. Toward that end, this letter is telecopied to you.

Very truly yours,

/s/ Richard V. Wicka

Richard V. Wicka
General Counsel
Litigation/Claims

EXHIBIT 85

[LOGO] BURLINGTON NORTHERN RAILROAD

[Name And Address Omitted In Printing]

TO WHOM IT MAY CONCERN:

Please be advised that all litigation surrounding the Intermodal Hub Construction Project at Burlington Northern's Gibson Yards in Omaha, Nebraska, has been settled to the satisfaction of the parties. The lawsuits associated with this project arose from a misunderstanding of properties and capabilities of Roller Compacted Concrete; specifically in conjunction with adverse subgrade moisture conditions.

Judds Brothers Construction continues to be a supplier of construction services to the Burlington Northern Railroad. Judds has also provided tie rehabilitation service to the Burlington Northern since 1987.

Sincerely,

/s/ William E. Glavin

File: 142663